No. 17-801	
Title:	In Re United States, et al., Petitioners
Docketed:	December 1, 2017
Linked with 17A570	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(17-72917)
Decision Date:	November 16, 2017

DATE	PROCEEDINGS AND ORDERS
Dec 01 2017	Petition for a writ of mandamus filed. (Response due January 2, 2018) **Proof of Service** **Petition**
Dec 01 2017	Application (17A570) for a stay pending the disposition of the petition for a writ of mandamus, submitted to Justice Kennedy. **Proof of Service** **Main Document**
Dec 01 2017	Response to application (17A570) requested by Justice Kennedy, due Wednesday, December 6, 2017, by 4 p.m. ET.
Dec 06 2017	Response to application from respondent United States District Court for the Northern District of California filed. **Main Document** **Proof of Service**
Dec 06 2017	Response to application from respondents California, et al. filed. **Main Document** **Proof of Service**
Dec 06 2017	Response to application from respondents Garcia, Dulce, et al. filed. **Main Document** **Proof of Service**
Dec 07 2017	Reply of applicants United States, et al. filed. **Proof of Service** **Reply**
Dec 08 2017	Application (17A570) referred to the Court.
Dec 08 2017	Application (17A570) granted by the Court. The application for a stay presented to JUSTICE KENNEDY and by him referred to the Court is granted, and the District Court's September 22, 2017, October 17, 2017, and November 20, 2017 orders, to the extent they require discovery and addition to the administrative record filed by the Government, are stayed pending disposition of the

	Government's petition for a writ of mandamus or in the alternative a writ of certiorari. Responses to the Government's petition for a writ of mandamus or in the alternative a writ of certiorari must be filed by Wednesday, December 13, 2017 at 4:00 p.m. JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting from grant of stay. (Detached **opinion**).
Dec 12 2017	Blanket Consent to the filing of amicus briefs in support of either party or of neither party, filed by Petitioner, United States, et al. **Blanket Consent**
Dec 13 2017	Brief of respondents State of California, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Brief of respondent Regents of the University of California and Janet Napolitano in her official capacity as President of the University of California in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Brief of respondent Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 13 2017	Brief amici curiae of Legal Scholars in support of respondents filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Brief amici curiae of Natural Resources Defense Council, Inc., and Public Citizen, Inc. in support of respondents filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Brief amici curiae of New York, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Brief amicus curiae of The State of Texas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 13 2017	Motion of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Governor of Colorado, District of Columbia for leave to file amicus brief not accepted for filing. (December 13, 2017)
Dec 15 2017	Reply of potitioners United States, et al. filed. **Proof of Service** **Main Document**
Dec 20 2017	Petition treated as a petition for a writ of certiorari and GRANTED. Judgment VACATED and case REMANDED. Opinion per curiam. (Detached **Opinion**)

Jan 22 2018	JUDGMENT ISSUED.

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No.

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided Court, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) policies for exercising DHS's enforcement discretion under federal immigration law, including an expansion of the DACA policy, were likely unlawful and should be enjoined. See *United States* v. *Texas*, 136 S. Ct. 2271 (per curiam). In September 2017, the Acting Secretary of Homeland Security decided to wind down the DACA policy.

Respondents filed suit challenging that policy determination. Without considering serious issues concerning the district court's jurisdiction and the reviewability of DHS's decision, the court authorized immediate discovery and ordered a sweeping expansion of the administrative record to encompass deliberative and other privileged materials, including White House documents covered by executive privilege. Over a dissent by Judge Watford, the Ninth Circuit denied mandamus relief. The question presented is:

Whether, in an action challenging a federal agency's discretionary enforcement policy, a district court may order broad discovery and expansion of the administrative record beyond that presented by the agency, including through the compelled addition and public disclosure of deliberative, pre-decisional documents and other privileged materials.

PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States of America; Donald J. Trump, President of the United States; the United States Department of Homeland Security; Elaine C. Duke, Acting Secretary of Homeland Security; and Jefferson B. Sessions III, Attorney General of the United States.

Respondent in this Court is the United States District Court for the Northern District of California. Respondents also include the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Maryland; the State of Minnesota; the City of San Jose; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Norma Ramirez; Jirayut Latthivongskorn; the County of Santa Clara; and Service Employees International Union Local 521 (collectively plaintiffs in district court, and real parties in interest in the court of appeals).

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In the Supreme Court of the United States

No.

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF MANDAMUS

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of mandamus to the United States District Court for the Northern District of California. In the alternative, the Solicitor General respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is not yet reported in the Federal Reporter, but is available at 2017 WL 5505730. An order of the district court (App., *infra*, 26a-44a) is not published in the Federal Supplement, but is available at 2017 WL 4642324. Two additional orders of the district court (App., *infra*, 21a-25a, 45a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted at App., *infra*, 70a-86a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement" of the Act. 8 U.S.C. 1103(a)(1). Individual aliens are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. IV 2016); see also 8 U.S.C. 1227(a). As a practical matter, however, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396.

For any individual alien subject to removal, Department of Homeland Security (DHS) officials must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. After removal proceedings begin, officials may decide to grant discretionary relief, such as asylum or cancellation of removal. See 8 U.S.C. 1158(b)(1)(A), 1229b. And, "[a]t each stage" of the process, "the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). Like other agencies exercising enforcement discretion, in making these decisions, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).

2. a. In 2012, DHS announced the policy known as Deferred Action for Childhood Arrivals, or DACA. See App., *infra*, 47a-51a. "Deferred action" is a practice in which the Secretary exercises discretion, "for humanitarian reasons or simply for [her] own convenience," to notify an alien of her decision to forbear from seeking his removal for a designated period. *AADC*, 525 U.S. at 484. A grant of deferred action does not confer lawful immigration status or provide any defense to removal. DHS retains discretion to revoke deferred action unilaterally, and the alien remains removable at any time.

DACA made available deferred action to "certain young people who were brought to this country as children." App., *infra*, 47a. Under the original DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal. *Id.* at 50a-51a. The DACA policy made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship," stating that "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 51a. DHS later expanded DACA (by extending the deferred-action period from two to three years and loosening the age and residency guidelines), and also created a new, similar policy referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which made deferred action available for certain individuals who had a child who was a U.S. citizen or lawful permanent resident. See *id.* at 52a-60a.

In 2014, Texas and 25 other States brought suit in the Southern District of Texas to enjoin DAPA and the expansion of DACA. The district court issued a nation-

wide preliminary injunction, finding a likelihood of success on claims that DAPA and expanded DACA violated the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* *Texas* v. *United States*, 86 F. Supp. 3d 591, 607, 647, 665-678 (2015). The Fifth Circuit affirmed, holding that those policies likely violated both the APA and the INA. *Texas* v. *United States*, 809 F.3d 134, 146 (2015). This Court affirmed that judgment by an equally divided Court, *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam), leaving in place the nationwide injunction against DAPA and the expansion of DACA.

b. In June 2017, Texas and other plaintiff States in the *Texas* case announced their intention to amend their complaint to challenge DACA in its entirety. App., *infra*, 66a. On September 5, 2017, rather than engage in litigation in which DACA would be challenged on essentially the same grounds that succeeded in *Texas*, DHS decided to wind down the remaining DACA policy in an orderly fashion. See *id.* at 61a-69a (Rescission Memo).

In the Rescission Memo, the Acting Secretary explained that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as advice from the Attorney General that the original DACA policy was unlawful and that the "potentially imminent" challenge to DACA would "likely * * * yield similar results" to the *Texas* litigation, "it is clear that the June 15, 2012 DACA program should be terminated." App., *infra*, 66a-67a. In light of the "complexities associated with winding down the program," however, the Rescission Memo stated that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." *Id.* at 67a. Specifically, it explained that DHS would "adjudicate—on an

individual, case by case basis—properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of [September 5, 2017], * * * from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id.* at 67a-68a. It further provided that the government "[w]ill not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum" for the remaining portion of an alien's two-year period, which could last until March 2020 for some recipients. *Id.* at 68a.

c. Shortly after the Acting Secretary's decision, respondents brought these five related suits in the Northern District of California challenging the rescission of DACA. App., *infra*, 27a-28a. Collectively, they allege that the termination of DACA is unlawful because it violates the APA's requirement for notice-and-comment rulemaking; is arbitrary and capricious; violates the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*; denies respondents due process and equal protection; and violates principles of equitable estoppel. Similar challenges have also been brought in district courts in New York, Maryland, and the District of Columbia.

The merits of respondents' challenges to the Rescission Memo are not presented here, because the district court has not yet considered the government's pending motion to dismiss on jurisdictional and justiciability grounds as well as for failure to state a claim. This petition is addressed instead to that court's extraordinary departure from bedrock principles governing judicial review of federal agency action. Before even considering the government's motion to dismiss, the district

court has ordered sweeping additions to the administrative record to include deliberative materials and allowed broad discovery into the subjective motivations of the Acting Secretary and those who advised her, including White House officials.

3. a. On September 21, 2017, the district court held an initial status conference to discuss a litigation schedule. 9/21/17 Tr. 7.[1] The government explained that the cases were likely subject to dismissal on threshold grounds, and accordingly proposed dispositive briefing as the first step. *Id.* at 23. The government explained that, at a minimum, no discovery would be appropriate prior to filing the administrative record and the court's ruling on the government's threshold dispositive motion. *Id.* at 23, 34-35; see *id.* at 22 (explaining that "discovery at this point would be premature and unnecessary and really inappropriate").

The district court rejected the government's position, stating that respondents' proposal to take immediate discovery was an "excellent idea." 9/21/17 Tr. 20; see also *id.* at 22-23. The court entered a scheduling order that authorized immediate expedited discovery, including depositions, document requests, interrogatories, and requests for admission. App., *infra*, 22a. The order directed the government to produce an administrative record by October 6, 2017. *Ibid.* And it set a deadline of November 1 for "[m]otions for summary judgment, provisional relief, or to dismiss," *id.* at 23a, with a hearing on those motions scheduled for December 20, *id.* at 25a.

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[1] Citations are to the district court docket in *Regents of the University of California* v. *United States Department of Homeland Security*, No. 17-cv-5211.

The government filed the administrative record on October 6, 2017, consisting of all non-deliberative materials compiled and considered by the Acting Secretary in reaching her decision to rescind the DACA policy. D. Ct. Doc. 64. Respondents promptly filed a motion to "complete" the administrative record, demanding the production of "[a]ll documents and communications circulated within DHS or DOJ" concerning DACA; "[a]ll documents and communications between DHS or DOJ and * * * the White House" concerning DACA; "[a]ll notices, minutes, agendas, list[s] of attendees, [and] notes" from meetings held about DACA; "[a]ll documents and communications evaluating the costs and benefits" of rescinding DACA; and "[a]ll documents and communications discussing policy alternatives to rescinding DACA." D. Ct. Doc. 65, at 1, 9-10 (Oct. 9, 2017) (footnote omitted). Respondents also demanded that the government "produce the withheld [*i.e.*, privileged] documents, or at a minimum, * * * immediately produce a privilege log." *Id.* at 16.

b. On October 10, 2017, the district court entered an order directing the government to file a "privilege log" by October 12, and to appear at an in-person hearing on October 16, with "hard copies of all emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D. Ct. Doc. 67, at 1. The government interpreted the order to require the production of a privilege log for only those documents that were actually considered by the Acting Secretary and bringing those documents to the hearing. See D. Ct. Doc. 71, at 3-4 (Oct. 12, 2017). The government filed a privilege log listing the documents from the Acting Secretary's files and briefly identifying the bases for privilege, see D. Ct. Doc. 71-2 (Oct. 12, 2017), and

submitted copies of these documents for *in camera* review.

At the October 16 hearing, the district court clarified that, in fact, it had expected the government to have arrived at the hearing with "[a]nything in the world that the agency has on the subject of rescinding DACA, whether it was with the Justice Department or not." 10/16/17 Tr. 10. The government explained that it had not interpreted the court's order in that manner and that complying with such an order "would have been impossible" due to the "enormous" volume of materials involved. *Id.* at 12.

c. Following the hearing, the district court granted in substantial part respondents' motion to "complete" the administrative record. See App., *infra*, 26a-44a. The court reasoned that "[t]he administrative record 'is not necessarily those documents that the agency has compiled and submitted as the administrative record.'" *Id.* at 29a (citation omitted). Rather, the court continued, regardless of the reasons offered by an agency for its decision or the record an agency compiles to support its reasoning, the "administrative record" for judicial review under the APA "'consists of all documents and materials directly or indirectly considered by agency decision-makers,'" *ibid.* (citation and emphasis omitted), including any documents "reviewed by subordinates, or other agencies who informed [the decision-maker] on the issues underlying the decision * * * either verbally or in writing," *id.* at 31a. And it reasoned that, even in the absence of any evidence of bad faith by the agency, a court could compel the production of all such documents if the plaintiffs could show, by clear evidence, that any had been omitted from the record compiled and presented by the agency. *Ibid.*

The district court further concluded that respondents had provided such evidence on the basis of four observations about the existing record. First, although the record included advice from the Attorney General on the legality of DACA, it did not contain any documents "supporting (or contradicting) the opinions set forth" in his letter, such as "the legal research that led to th[e] [Attorney General's] conclusion." App., *infra*, 33a, 38a. Second, although the government "concede[d]" that the Acting Secretary "received advice from other members of the executive branch" and had listed a "White House memorandum" in its privilege log, the existing record did not contain any nonpublic communications from "White House officials or staff." *Id.* at 34a (citations omitted). Third, the record did not contain any documents from the Acting Secretary's subordinates providing their "input" on the Acting Secretary's decision. *Ibid.* Fourth, the record did not include any "materials explaining the [agency's] change in position" on the continuation of the DACA policy, "with two exceptions": (1) the letter from the Texas Attorney General threatening to amend the complaint in the *Texas* suit to challenge the original DACA policy, and (2) the Attorney General's letter expressing his view that the original DACA policy was unlawful and would likely be enjoined. *Id.* at 35a. This, the court concluded, was clear evidence that the government had excluded relevant materials from the administrative record. *Ibid.*

The district court further determined that, because the Acting Secretary had pointed to concerns about DACA's legality in rescinding the policy, the government had categorically "waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power."

App., *infra*, 39a. And the court ruled—without briefing or individual discussion of any document—that 35 of the documents submitted for *in camera* review must be filed on the public docket. *Id.* at 43a. It did not dispute that those documents were covered by the deliberative-process privilege, but held that the privilege was overridden by an unspecified "need for materials" and for "accurate fact-finding" in the litigation. *Id.* at 40a. Moreover, although several of those documents are White House documents subject to a claim of executive privilege, the court announced in a footnote, again without briefing, that "[none] of these documents fall[s] within the executive privilege." *Id.* at 40a n.7.

On these bases, the district court ordered the government to "complete the administrative record" with "all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA," including "(1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with" the challenged decision (except for those documents on the original privilege log that the judge had not ordered released); "(2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with *written* advice or input regarding the actual or potential rescission of DACA"; "(3) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with *verbal* input regarding the actual or potential rescission of DACA"; "(4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of

DACA and their responses"; and "(5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA." App., *infra*, 42a-43a (emphases added).

The district court further directed that, if the government "redacts or withholds any" of these materials as privileged, it must submit another privilege log and "simultaneously lodge full copies of all such materials," so that the court could "review and rule on each item." App., *infra*, 43a. The court's order also specified that it "[wa]s not intended to limit the scope of discovery" sought by respondents. *Id.* at 44a.

d. In the meantime, respondents served numerous discovery requests upon the government, including requests for production, interrogatories, requests for admission, and deposition notices. In an effort to comply with the district court's accelerated discovery deadlines, as well as similarly accelerated deadlines in cases challenging the rescission of DACA in the Eastern District of New York,[2] DHS undertook a dramatic reassignment of attorney, staff, and technology resources. At DHS headquarters, all full-time litigation staff were "assigned to review documents in the various DACA cases," and additional attorneys in other legal practice

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[2] The district court in those cases issued a similar series of orders authorizing immediate discovery and directing expansion of the administrative record. See *Batalla Vidal* v. *Duke*, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017). When the government filed a petition for a writ of mandamus, the Second Circuit stayed those orders pending adjudication of the petition. See Order at 1, *In re Duke*, No. 17-3345 (Oct. 24, 2017). That stay remains in place.

areas were diverted to document review. Stay Addendum (Stay Add.) 9-10. At Customs and Border Protection, information-technology staff were required to suspend "all of [their] work for other cases and court deadlines" in order to "expend the entire resource of E-Discovery's computer server" on respondents' discovery requests. *Id.* at 6. At Citizenship and Immigration Services, numerous attorneys were reassigned to discovery in the DACA litigation, and information-technology staff "made responding to [these] discovery requests" their "exclusive focus," postponing work on agency investigations as a result. *Id.* at 12. And at Immigration and Customs Enforcement (ICE), "[one] out of every 14 attorneys in ICE's legal offices across the country" were "pulled * * * from immigration court appearance responsibilities and other regular duties" to handle discovery in the DACA lawsuits. *Id.* at 16. Those efforts were "completely unprecedented" in the history of the agency. *Ibid.*

Respondents also noticed numerous depositions, including of high-level government officials and senior advisors. To date, respondents have deposed six government officials and have noticed the depositions of various others, including the Acting Secretary of Homeland Security herself. On October 24, 2017, the magistrate judge overruled the government's objections to the noticed deposition of the Acting Secretary. D. Ct. Doc. 94, at 1. And, although the government has not yet appealed that decision to the district court due to intervening stays of discovery, the court has already made clear its view. See 10/16/17 Tr. 35 ("[M]y own view is I would order that deposition pronto.").

e. In response to these extraordinary rulings and intrusions on the workings of the Executive Branch, the

government indicated its intent to seek mandamus relief from the court of appeals, and moved the district court to stay all discovery and expansion of the administrative record pending the resolution of that request. See D. Ct. Doc. 81 (Oct. 18, 2017). The district court denied the motion. See D. Ct. Doc. 85 (Oct. 19, 2017).

4. On October 20, 2017, the government filed its mandamus petition in the court of appeals, together with an emergency request for a stay, explaining that "[t]he district court's conduct in this case depart[ed] from settled principles of judicial review of agency action." Gov't C.A. Mandamus Pet. 2. The government requested that the court of appeals issue a writ of mandamus to "stay the district court's order to expand the administrative record to include sensitive privileged materials—including documents from the White House—and to stay ongoing discovery, including the depositions of high-ranking government officials." *Id.* at 1.

a. The court of appeals initially granted the government's emergency stay request. See 10/24/17 C.A. Order. But, on November 16, 2017, after expedited briefing and argument, a divided panel denied the government's petition and lifted its prior stay. App., *infra*, 1a-15a.

The panel majority (Judges Wardlaw and Gould) concluded that the district court had not "clearly erred" in reasoning that "DHS failed to comply with its obligation under the APA to provide a complete administrative record to the court." App., *infra*, 3a. Echoing the district court's reasoning, the court of appeals concluded that a "complete" administrative record includes not just the documents that the agency has compiled and that "form the basis for [its] ultimate decision," but "all materials that might have influenced the agency's decision." *Id.* at 8a (citations and internal quotation

marks omitted). Like the district court, it found significant the absence of legal research supporting the Attorney General's legal opinion, materials from the White House, and analysis from the Acting Secretary's subordinates. *Id.* at 7a-8a. On that basis, the panel majority reasoned that the district court could order production of "all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even [if] the final decision-maker did not actually review or know about the documents and materials." *Id.* at 10a (citation and emphasis omitted).

In response to the government's argument that the materials at issue were deliberative and properly form no part of the administrative record, the panel majority concluded that the district court's contrary ruling was not clearly erroneous because the Ninth Circuit had not previously addressed that question. App., *infra*, 14a. And it distinguished contrary D.C. Circuit precedent on the ground that that decision concerned deliberations among the members of a multi-member agency board rather than within a single Cabinet agency. *Id.* at 14a-15a (citing *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986)).

Finally, the panel majority discounted "the separation-of-powers concerns raised by the government." App., *infra*, 3a. The majority rejected the government's argument, based on *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), that "requiring White House officials to search for and assert privilege as to individual documents would be an unwarranted intrusion into executive decision-making." App., *infra*, 12a. It noted that *Cheney* involved civil discovery rather than the

compilation of an administrative record. *Ibid.* The majority suggested that *Cheney* was also inapposite because "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." *Id.* at 13a.

b. Judge Watford dissented. App., *infra*, 16a-20a. In his view, the district court's order "constitute[d] 'a clear abuse of discretion,'" *id.* at 16a (citation omitted), and presented a "classic case in which mandamus relief is warranted," *id.* at 20a. Judge Watford observed that the district court's order "violate[d] two well-settled principles governing judicial review of agency action under the [APA]." *Id.* at 16a. First, "a court ordinarily conducts its review 'based on the record the agency presents to the reviewing court.'" *Ibid.* (citation omitted). Second, "documents reflecting an agency's internal deliberative processes are ordinarily not part of the administrative record," because "[t]he court's function is to assess the lawfulness of the agency's action based on the reasons offered by the agency." *Id.* at 17a.

Judge Watford noted that the district court's order "sweeps far beyond" the normal scope of APA review, extending even to "comments and questions propounded by Acting Secretary Duke to advisors" and other materials indisputably "deliberative in character." App., *infra*, 19a-20a. He emphasized that respondents had not made any showing of "'bad faith or improper behavior' on the part of agency decision-makers" to justify a departure from those well-established principles. *Id.* at 18a (citation omitted). And he reasoned that "the burden imposed by the [district court's] order is exceptional enough to warrant the extraordinary remedy of mandamus." *Id.* at 16a.

5. a. Hours after dissolution of the stay, the district court ordered the government to file the "complete administrative record" within six days, by noon on Wednesday, November 22, 2017. D. Ct. Doc. 188, at 1 (Nov. 16, 2017). Expressing its intention to seek emergency relief from this Court, the government filed in both the court of appeals and the district court motions for a stay pending this Court's resolution of the government's forthcoming petition. 11/17/17 C.A. Mot. to Stay; D. Ct. Doc. 191 (Nov. 19, 2017). Both of those motions were denied. Stay Add. 1-2, 3-4.

b. Remarkably, after seeking immediate record expansion and discovery, and vigorously opposing the government's mandamus petition, respondents filed their own motion in district court to stay all expansion of the administrative record and all discovery until the district court ruled on both respondents' motion for a preliminary injunction and the government's motion to dismiss. D. Ct. Doc. 190 (Nov. 19, 2017). Respondents volunteered that they sought this relief in an effort to "obviate Defendants' efforts to obtain a stay from the Supreme Court." *Id.* at 4.

c. On November 20, 2017, the district court entered an order staying all discovery until December 22, and "allow[ing] the government an additional month [*i.e.*, until December 22] to compile and to file the augmented administrative record." App., *infra*, 45a. The court directed, however, that "[a]lthough the government need not file until that date, it must promptly locate and compile the additional materials and be ready to file the fully augmented record by December 22." *Id.* at 45a-46a. In all other respects, the court denied respondents' requested stay. *Id.* at 46a.

REASONS FOR GRANTING THE PETITION

The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable,"' and (3) 'the writ is appropriate under the circumstances.'" *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). As Judge Watford recognized, all three criteria are plainly met by the district court's extraordinary disregard for settled principles of judicial review of agency action and sweeping intrusions into the internal deliberations and privileged communications of the Executive Branch, including the White House itself. This Court should issue a writ of mandamus directly to the district court correcting these errors. See *ibid.* (This Court may "issue the writ of mandamus directly to a federal district court.").

In the alternative, because the court of appeals' decision is equally inconsistent with the precedents of this Court, and creates a conflict with decisions of the D.C. Circuit on important, recurring issues of judicial review of agency action, this Court may wish to construe this petition as a petition for a writ of certiorari, grant the writ, and reverse the court of appeals' refusal to grant mandamus relief.[3]

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[3] In *Cheney*, which involved circumstances similar to this case, this Court granted the government's certiorari petition but declined to issue extraordinary relief, noting that "this Court wa[s] not presented with an original writ of mandamus." 542 U.S. at 391. Petitioners seek mandamus directly to the district court here because its errors are clear and indisputable.

A. The Government Has No Other Adequate Means To Attain Relief

Absent mandamus relief, the district court's orders will be effectively unreviewable on appeal from final judgment. If the court's order to compile the "complete" administrative record is not immediately vacated and if the orders requiring discovery and public filing of deliberative materials are allowed to take effect, there will be no going back. The White House, DHS, and the Department of Justice (DOJ) will have been required to collect, review, and assert privilege as to thousands of additional documents; numerous deliberative materials will have been made public; various privileges, including executive privilege, will have been breached based on the court's existing erroneous privilege rulings (and any more that follow); and high-ranking government officials will have been deposed. As Judge Watford recognized—and the majority did not dispute—these circumstances "remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable," *Cheney*, 542 U.S. at 381, and they make it a "classic case in which mandamus relief is warranted," App., *infra*, 20a (Watford, J., dissenting).

B. The District Court Clearly And Indisputably Erred By Ordering That Deliberative And Other Materials Be Added To The Administrative Record, Authorizing Broad Discovery, And Summarily Overruling The Government's Assertions Of Privilege

The government's right to a writ of mandamus staying record expansion and discovery is "clear and indisputable." *Perry*, 558 U.S. at 190 (citation omitted).[4] In

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[4] The court of appeals stated in a footnote that "[i]ssues regarding supplementation—as opposed to completion—of the record and the

the name of "complet[ing]" the administrative record and facilitating judicial review, the district court authorized discovery and ordered the production of "all DACA-related materials" considered by any person "anywhere in the government" who provided written or verbal input to the Acting Secretary and "all comments and questions propounded by Acting Secretary Duke" to any person "regarding the actual or potential rescission of DACA and their responses." App., *infra*, 42a-43a. Those materials are expressly defined to include vast categories of deliberative, nonpublic documents, including "all emails, letters, memoranda, notes, media items, opinions and other materials" in the possession of the Acting Secretary's subordinates and advisers. *Id.* at 42a. That order upends fundamental principles of judicial review of agency action in several respects.

1. The district court clearly and indisputably erred by ordering expansion of the administrative record and authorizing intrusive discovery

a. First, the district court plainly erred by authorizing discovery and ordering the government to "complete" the administrative record with materials beyond those presented by the agency to the court. App., *infra*, 42a-43a. This Court has held that, in agency review

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propriety of discovery on the non-APA claims, including the propriety of depositions, are not properly before us at this time, and we do not address them." App., *infra*, 2a-3a n.1. But the government expressly objected to all record expansion and all discovery in the district court, see p. 6, *supra*, and it "respectfully ask[ed] th[e] [court of appeals] to issue a writ of mandamus to stay the district court's order to expand the administrative record * * * and to stay ongoing discovery," Gov't C.A. Mandamus Pet. 1. Those issues therefore were squarely before that court, and they are similarly before this Court.

cases, "[t]he APA specifically contemplates judicial review on the basis of the *agency* record." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 743 (brackets and citation omitted). And "[t]he task of the reviewing court is to apply the appropriate APA standard of review * * * to the agency decision based on the record the agency presents to the reviewing court." *Id.* at 743-744.

It is only in cases where the agency has provided no explanation for its decision, or where challengers have made a "strong showing of bad faith or improper behavior," that a district court may go beyond the agency record and "require the administrative officials who participated in the decision to give testimony explaining their action." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). Where, as here, neither exception has been met, the validity of the agency's action "must * * * stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review," *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (per curiam), and "based on the record the agency presents to the reviewing court," *Florida Power & Light*, 470 U.S. at 744. The district court's sweeping expansion of the administrative record—in the face of the Acting Secretary's contemporaneous and reasonable explanation for her decision—directly contradicts this Court's precedents.

The district court's error in ordering discovery and vastly expanding the administrative record is particularly manifest in light of the nature of the agency's decision: a policy determination by the Acting Secretary to wind down, in orderly fashion, a previous policy

of prosecutorial discretion that itself created no substantive rights. As the government has explained in its pending motion to dismiss, see D. Ct. Doc. 114, at 17-20 (Nov. 1, 2017), that decision is unreviewable under 8 U.S.C. 1252(g), which prohibits actions challenging "'deferred action' decisions and similar discretionary determinations * * * outside the streamlined process that Congress has designed"—*i.e.*, after a final decision of removal—*Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999); see *id.* at 485 & n.9, and constitutes an unreviewable exercise of prosecutorial discretion under 5 U.S.C. 701(a)(2), see *Heckler* v. *Chaney*, 470 U.S. 821, 828-835 (1985).

But even assuming the decision is not entirely unreviewable, it was, by its nature, a discretionary statement of policy that did not require any particular evidentiary or other record. The Acting Secretary's explanation for her decision rested on her assessment of the risks presented by (and the ultimate legality of) maintaining a policy (original DACA) that was materially identical to ones (expanded DACA and DAPA) struck down by the Fifth Circuit in a decision affirmed by this Court, and that the plaintiffs who prevailed in that earlier suit intended to challenge before the same court on the same grounds. No factual or evidentiary record is required to evaluate the reasonableness of the Acting Secretary's policy and legal judgment. There is thus no basis for the district court's belief that a search for documents "anywhere in the government" is remotely necessary to make sure that the agency is not "withholding evidence unfavorable to [the Acting Secretary's] position." App., *infra*, 29a, 42a-43a. "Indeed, it would be implausible to think that any such material exists." *Id.* at 18a (Watford, J., dissenting).

The ordered record expansion and discovery are particularly egregious due to the burdens they impose not only on DHS and DOJ, but directly on the highest level of the Executive Branch, the White House itself. This Court held in *Cheney* that discovery directed to the White House raises "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office" and "[t]he high respect that is owed to the office of the Chief Executive." 542 U.S. at 385 (citation omitted; brackets in original). The "public interest requires that a coequal branch of Government * * * give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Id.* at 382.

Just as it was improper for the district court in *Cheney* to require the White House to search for and produce "[a]ll documents concerning any communication relating to the * * * preparation of the" National Energy Policy Development Group's final report, 542 U.S. at 387 (citation omitted), it is improper here for the district court to order that White House officials search for and produce any DACA-related materials considered by anyone "who thereafter provided Acting Secretary Duke" with any written or verbal input on her policy decision, App., *infra*, 42a-43a. That the court did so even before it rules on the government's motion to dismiss and decides whether it can hear this case at all further underscores its failure to heed this Court's command that the "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney*, 542 U.S. at 389-390 (quoting *United States* v. *Nixon*, 418 U.S. 683, 692 (1974)) (brackets in original).

Respondents cannot evade these limitations on agency review by pointing to their constitutional claims. Constitutional challenges to agency action are governed by the APA just like any other challenge. See 5 U.S.C. 706(2)(B) ("The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * contrary to constitutional right, power, privilege, or immunity."). Indeed, the limitations imposed by the APA on discovery have particular force where, as here, a suit raises claims of discriminatory motive behind enforcement decisions. In *United States* v. *Armstrong*, 517 U.S. 456 (1996), this Court explained that a "presumption of regularity supports" prosecutorial decisions. *Id.* at 464 (citation omitted). Thus, "in the absence of clear evidence to the contrary, courts presume that [Executive Branch officials] have properly discharged their official duties," *ibid.* (citation omitted), and must apply "rigorous standard[s] for discovery in aid of" discriminatory-enforcement claims, *id.* at 468. And in *AADC*, the Court explained that the concerns animating that rule are "greatly magnified in the deportation context" because of incentives for delay, the continuing nature of immigration violations, and heightened separation-of-powers concerns. 525 U.S. at 489-491.

b. The court of appeals justified the district court's expansion of the record based on its view that, if the administrative record did not include "all documents and materials directly or indirectly considered by agency decision-makers," App., *infra*, 5a (citation and emphasis omitted), the agency's action would "become effectively unreviewable," *id.* at 3a. But that concern is misplaced and evinces a fundamental misconception of a reviewing court's role under the APA.

As this Court has held, in judicial review of agency action, the court "is not generally empowered to conduct a *de novo* inquiry into the matter under review and to reach its own conclusions based on such an inquiry." *Florida Power & Light*, 470 U.S. at 744. Its task is to determine whether the agency's action may be upheld on the basis of the reasons the agency provides and "the record the agency presents to the reviewing court." App., *infra*, 16a (Watford, J., dissenting). If the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end and the agency's decision must be sustained. If, on the other hand, "the record compiled by the agency is inadequate to support the challenged action," the result is equally straightforward: the agency's decision is vacated and the matter is remanded to the agency for it either to change its decision or to compile a record that will support it. *Ibid.*; see *Florida Power & Light*, 470 U.S. at 744. In either event, judicial review is not thwarted. Rather, the agency's action simply must "stand or fall" on the rationale and the record that the agency has compiled. Thus, it is "the agency [that] bears the risk associated with filing an incomplete record, not the challengers." App., *infra*, 17a (Watford, J., dissenting).

The court of appeals relied heavily on informal guidance provided by DOJ's Environment and Natural Resources Division (ENRD) to its client agencies in 1999. App., *infra*, 10a. The ENRD document suggested that, when compiling an administrative record, an agency should include "all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker." *Ibid.* But that former guidance by ENRD on what its client agencies

should include in the administrative record is not the same as what the APA requires or what a court may order an agency to produce. Precisely because it is the agency that bears the risk of an insufficient record, agencies may, in some instances, choose to include more than the law requires. But, outside of narrow circumstances not present here, that is the agency's decision, not the reviewing court's.[5] See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (Courts may "not stray beyond the judicial province * * * to impose upon the agency [their] own notion of which procedures are 'best.'").

c. The court of appeals posited that separation-of-powers concerns about intruding upon the internal workings of a coordinate Branch were not implicated by the district court's order because the burdens on the

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[5] The ENRD's original 1999 guidance recognized that distinction. See App., *infra*, 32a n.5 (explaining that the guidance was not intended to place any limitations on the "lawful prerogatives of the Department of Justice or any other federal agency" in compiling an administrative record) (citation omitted). And ENRD has reiterated as much on multiple occasions since. See Gov't C.A. Mandamus Pet. Reply Addendum (Reply Add.) 5 (stating that the "1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record," because "[t]he composition of an administrative record is left to the sound discretion of the relevant federal agency, within the bounds of controlling law"); accord *id.* at 7 n.1. The court of appeals found "inexplicabl[e]" the timing of that most recent statement by ENRD. App., *infra*, 11a. But ENRD quite clearly explained that it was prompted by a recent filing by the government in a different case before the Ninth Circuit implicating similar questions. See Reply Add. 7 ("[W]e want to make sure you know that the [*In re*] *Price*[, No. 17-71121,] petition represents the view of the United States on this issue.").

White House result from the completion of the administrative record, not ordinary civil discovery. App., *infra*, 12a-13a. But the court of appeals provided no explanation for why a discovery order issued under the guise of "completing" an administrative record would intrude any less upon the "Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications" than one issued through ordinary civil discovery—and none is apparent. *Cheney*, 542 U.S. at 385.

The court of appeals also stated that "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." App., *infra*, 13a. But there is simply no basis for that conclusion. Indeed, it would be wholly implausible to assume that neither the President nor Vice President provided any advice to the Acting Secretary concerning her decision. The court of appeals recognized as much elsewhere in its decision. See *id.* at 7a (noting "evidence that [the White House] w[as] involved in the decision to end DACA, including the President's own press release taking credit for the decision"); see also *id.* at 33a-34a (reasoning that "the White House has repeatedly emphasized the President's direct role in decisions concerning DACA").

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In short, as Judge Watford explained, "the desire for greater insight into how DHS arrived at its decision is not a legitimate basis for ordering the agency to expand the administrative record, unless [respondents] make a threshold factual showing justifying such action." App., *infra*, 16a. No such showing was made here. *Ibid.*

2. The district court clearly and indisputably erred by ordering expansion of the administrative record to include deliberative materials

a. The district court compounded its error by ordering that deliberative materials be added to the administrative record. This Court has made clear that it is "not the function of the court to probe the mental processes" of the agency. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); see *Overton Park*, 401 U.S. at 420. "Just as a judge cannot be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected." *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*). Thus, in *Morgan II*, the Court held that the trial court had erred in permitting the deposition of the Secretary of Agriculture "regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." *Ibid.* And on the basis of these precedents, the D.C. Circuit has long recognized that requests to supplement the administrative record with deliberative materials, such as transcripts of an agency's closed meetings, draft opinions, or internal memoranda, must similarly be rejected absent a strong showing of "bad faith [or] improper conduct." *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 28, 44-45 (en banc) (plurality opinion), cert. denied, 479 U.S. 923 (1986); see *id.* at 45-46 (Mikva, J., concurring in the result); see also *Checkosky* v. *SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (Randolph, J.); *Checkosky*,

23 F.3d at 454 (per curiam) (rejecting petitioners' challenge "as per Part V of Judge Randolph's opinion").[6]

"Agency opinions, like judicial opinions, speak for themselves. And agency deliberations, like judicial deliberations, are for similar reasons privileged from discovery." *Checkosky*, 23 F.3d at 489 (Randolph, J.). Requiring public disclosure and judicial consideration of deliberative materials would "represent an extraordinary intrusion into the realm of the agency" and impede the Executive's ability to "engage in uninhibited and frank discussions," just as a "court could not fully perform its functions" without "assurance[s] of secrecy" for its own deliberative materials. *San Luis Obispo*, 789 F.2d at 44-45.

The APA's provisions governing formal administrative proceedings underscore the point. In that context, the APA provides that the "exclusive record for decision" consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. 556(e). Materials not "filed in the proceeding" pursuant to the agency's procedures, such as internal agency documents memorializing the agency's deliberations or agency personnel's handwritten notes, are categorically outside the administrative record under Section 556(e). Although the APA does not contain a parallel provision prescribing the contents of the administrative record for informal agency actions (like the statement of discretionary enforcement policy here), there is no reason why deliberative agency materials

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[6] See also *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998); *Kansas State Network, Inc.* v. *FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) ("[A]n agency's action should be reviewed based upon what it accomplishes and the agency's stated justifications.").

should be included in this context. To the contrary, that character of the decision gives the agency more latitude in deciding what belongs in the record it compiles. See *Vermont Yankee*, 435 U.S. at 549.

The district court plainly violated these principles by ordering the production of "all emails, letters, memoranda, notes, media items, opinions and other materials" considered by the Acting Secretary or her subordinates in the course of making her decision to rescind DACA, as well as "all comments and questions propounded by Acting Secretary Duke" to anyone on the subject. App., *infra*, 42a-43a. Indeed, the court justified its action based expressly on its observation that the existing record did not include obviously deliberative materials, such as advice from her subordinates or "legal research" regarding the Attorney General's opinion on the legality of DACA. *Id.* at 38a; see *id.* at 42a-43a. But, as Judge Watford explained, "[d]ocuments analyzing DACA's potential legal infirmities, prepared to assist the Acting Secretary in assessing the gravity of the litigation risk involved, fall squarely within the category of deliberative process materials * * * presumptively outside the scope of what must be included in the administrative record." *Id.* at 18a-19a (Watford, J., dissenting). They are also irrelevant to assessing the reasonableness of the Acting Secretary's legal and policy judgment.

The district court stated that the government could withhold documents as privileged provided that it (1) submits a privilege log listing all withheld documents, including the authors and recipients of each document, the steps taken to ensure the confidentiality of each document, the date of each document, and its subject matter, D. Ct. Doc. 23, at 5 (Sept. 13, 2017), and

(2) "simultaneously lodge[s] full copies of all such materials, indicating by highlighting (or otherwise) the redactions and withholdings," App., *infra*, 43a. But given that such documents are categorically outside the administrative record, the court had no basis for imposing that onerous burden on the government. Nor, in light of the court's treatment of the government's assertions of privilege to date, see pp. 31-32, *infra*, would that course provide any assurance that the district court's procedures would successfully protect the government's privileged communications in any event.

The district court again exacerbated its error by including the White House within its expansion order. This Court in *Cheney* expressly rejected the contention that the White House could sufficiently protect itself against intrusive discovery through individual privilege assertions, holding that the White House should not unnecessarily be placed in the position of having to assert executive privilege. 542 U.S. at 390. As the Court explained, "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course," and "[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." *Id.* at 389. The district court was thus required to "explore other avenues, short of forcing the Executive to invoke privilege." *Id.* at 390.

b. The court of appeals' only justification for the district court's order to produce deliberative materials was that it could not find clear error because the court of appeals had not previously addressed the propriety of such an order. App., *infra*, 14a. But it should have been enough that *this Court* has addressed the subject. See *Florida Power & Light*, 470 U.S. at 744; *Overton Park*,

401 U.S. at 420; *Morgan II*, 313 U.S. at 422; *Morgan*, 304 U.S. at 18. It is not within the authority of the court in an APA suit to probe the mind of the decisionmaker or the agency's internal deliberations.

3. The district court clearly and indisputably erred by summarily dismissing the government's assertions of privilege

Finally, the district court added insult to compounded injury through its dismissive treatment of the government's assertions of privilege over the documents produced for *in camera* review at the court's direction. Despite receiving no briefing regarding any specific assertion of privilege, the court ordered disclosure of 35 documents protected by deliberative-process privilege with no explanation other than a conclusory statement that "[t]he undersigned judge has balanced the deliberative-process privilege factors and determined *in camera*" that the documents must be disclosed. App., *infra*, 43a. Those documents include, among other things, the Acting Secretary's handwritten notes on deliberations regarding the rescission of DACA, on legal advice she received regarding that policy decision, and on the implementation of the wind-down of the DACA policy. Stay Add. 26. The court offered no explanation why such documents were relevant to the court's task on APA review at all, much less why the need for such documents was so compelling as to overcome the presumption against disclosure.

The district court also gravely erred by ordering disclosure of various White House documents covered by executive privilege. The court declared in a footnote that none "of these documents fall[s] within the executive privilege," App., *infra*, 40a n.7, but that cursory statement is flatly incorrect. One of these documents,

for example, is a *memorandum from the White House Counsel to the President*. Stay Add. 26. The court provided no basis for its disregard of executive privilege, which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. There is no justification for the court's dismissive treatment of "the Executive's Article II prerogatives." *Cheney*, 542 U.S. at 389.

The district court also seriously erred in declaring that "[d]efendants have waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." App., *infra*, 39a. The court based that extraordinary ruling on the fact that the Acting Secretary's decision followed consideration of litigation risk and the legality of the DACA policy. Agencies, however, routinely announce their views of what the law requires in the Federal Register, and doing so has never jeopardized attorney-client privilege. Nor does an agency's consideration of a DOJ opinion, a salutary agency practice, especially since the Acting Secretary chose to include that opinion in the administrative record she produced to defend her decision. And even assuming the correctness of the Acting Secretary's legal judgment were ever found relevant to disposition of these cases, assessing its correctness would not depend on the "legal research" used to reach that conclusion. *Id.* at 38a. The court's finding of a blanket waiver of attorney-client privilege was wholly inappropriate.

C. Mandamus Relief Is Appropriate Under The Circumstances

Although the writ of mandamus is extraordinary relief, this Court has explained that it is appropriately used "to confine an inferior court to a lawful exercise of

its prescribed jurisdiction," *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," *Cheney*, 542 U.S. at 382; and to correct "particularly injurious or novel privilege ruling[s]," *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 110 (2009). The district court's stark departure from "fundamental principles of judicial review of agency action," *Florida Power & Light*, 470 U.S. at 743; its unwarranted intrusions on the "confidentiality and autonomy" of the highest levels of the Executive Branch, *Cheney*, 542 U.S. at 389; and its casual disregard of the government's legitimate assertions of executive and other privileges satisfies each of those justifications for mandamus. The denial of relief here would cause "immediate and irreparable" harm to the government while imposing minimal burdens on respondents, who already requested much of the same relief (in an effort to stave off this Court's review). App., *infra*, 20a. Judge Watford did not overstate matters when he called this a "classic case" for a writ of mandamus. *Ibid.*

CONCLUSION

The Court should issue a writ of mandamus to the district court, ordering it to halt all expansion of the administrative record and discovery. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decision denying the petition for a writ of mandamus below.

Respectfully submitted.

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DECEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-72917

D.C. Nos. 3:17-cv-05211-WHA, 3:17-cv-05235-WHA,
3:17-cv-05329-WHA, 3:17-cv-05380-WHA,
3:17-cv-05813-WHA

Northern District of California, San Francisco

IN RE: UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE,

UNITED STATES OF AMERICA; DONALD J. TRUMP; U.S. DEPARTMENT OF HOMELAND SECURITY; ELAINE C. DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,
RESPONDENT,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MINNESOTA; STATE OF MARYLAND; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; COUNTY OF SANTA CLARA; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521; JIRAYUT LATTHIVONGSKORN; SAUL JIMENEZ SUAREZ, REAL PARTIES IN INTEREST

Petition for Writ of Mandamus

Argued and Submitted Nov. 7, 2017
Pasadena, California

[Filed: Nov. 16, 2017]

ORDER

Before: WARDLAW, GOULD, and WATFORD, Circuit Judges.

WARDLAW and GOULD, Circuit Judges:

On September 5, 2017, the Acting Secretary of the Department of Homeland Security ("DHS"), Elaine Duke, announced the end of DHS's Deferred Action for Childhood Arrivals policy ("DACA"), effective March 5, 2018. Begun in 2012, DACA provided deferred action for certain individuals without lawful immigration status who had entered the United States as children. Several sets of plaintiffs sued to enjoin the rescission of DACA under the Administrative Procedure Act ("APA") and under various constitutional theories not relevant here.

The merits of those claims are not before us today. The only issue is a procedural one, raised by the government's petition for a writ of mandamus. The government asks us to permanently stay the district court's order of October 17, 2017, which required it to complete the administrative record.[1] *See* Order re

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[1] Issues regarding supplementation—as opposed to completion—of the record and the propriety of discovery on the non-APA claims,

Motion to Complete Administrative Record, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324 (October 17, 2017) ("Order"). We have jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651. Because the district court did not clearly err by ordering the completion of the administrative record, we hold that the government has not met the high bar required for mandamus relief.

One note at the outset: We are not unmindful of the separation-of-powers concerns raised by the government. However, the narrow question presented here simply does not implicate those concerns. We consider only whether DHS failed to comply with its obligation under the APA to provide a complete administrative record to the court—or, more precisely, whether the district court clearly erred in so holding. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision."). This obligation is imposed to ensure that agency action does not become effectively unreviewable, for "[i]f the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). Assuring that DHS complies with this requirement—imposed by the APA on all agencies and embodied in decades of precedent—is undoubtedly a proper judicial function.

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including the propriety of depositions, are not properly before us at this time, and we do not address them here.

1. "The writ of mandamus is a drastic and extraordinary remedy reserved only for really extraordinary cases." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947) (internal quotation marks omitted)). Indeed, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Ultimately, the issuance of the writ is "in large measure . . . a matter of the court's discretion." *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1023 (9th Cir. 2014) (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)).

Our discretion is guided by the five factors laid out in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977). However, we need not consider four of those five factors here, because "the absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (quoting *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)). This factor—whether "[t]he district court's order is clearly erroneous as a matter of law," *Bauman*, 557 F.2d at 654-55—"is significantly deferential and is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *In re Bundy*, 840 F.3d at 1041 (quoting *In re United States*, 791 F.3d at 955).

2. The district court's order is not clearly erroneous as a matter of law. APA § 706 provides that arbitrary and capricious review shall be based upon "the

whole record or those parts of it cited by a party." 5 U.S.C. § 706. The whole record "includes everything that was before the agency pertaining to the merits of its decision." *Portland Audubon*, 984 F.2d at 1548; *see also, e.g., James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made.") (internal quotation marks and citations omitted). More specifically, we have explained that the whole administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (same). The record is thus not necessarily limited to "those documents that the *agency* has compiled and submitted as 'the' administrative record." *Thompson*, 885 F.2d at 555 (internal quotation marks omitted).

At the initial case management conference before the district court, the government agreed to produce the complete administrative record on October 6, 2017. On that date, the government submitted as "the" administrative record fourteen documents comprising a mere 256 pages, all of which are publicly available on the internet. Indeed, all of the documents in the government's proffered record had previously been included in filings in the district court in this case, and 192 of its 256 pages consist of the Supreme Court, Fifth Circuit,

and district court opinions in the *Texas v. United States* litigation.[2]

Faced with this sparse record, and on the plaintiffs' motion (opposed by the government), the district court ordered the government to complete the record to include, among other things, all DACA-related materials considered by subordinates or other government personnel who then provided written or verbal input directly to Acting Secretary Duke. The district court excluded from the record documents that it determined *in camera* are protected by privilege. Order at *8.

3. The administrative record submitted by the government is entitled to a presumption of completeness which may be rebutted by clear evidence to the contrary. *Bar MK Ranches*, 994 F.2d at 740; *see also Thompson*, 885 F.2d at 555 (noting that the administrative record "is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record."). The district court correctly stated this legal framework and concluded that the presumption of completeness had been rebutted here. Order at *5. This conclusion was not clear legal error: Put bluntly, the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people[3] based solely

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[2] That lawsuit challenged a related but distinct deferred action policy, Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. *See United States v. Texas*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[3] *See* U.S. Citizenship and Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Sta-*

on 256 pages of publicly available documents is not credible, as the district court concluded.[4]

The district court identified several specific categories of materials that were likely considered by the Acting Secretary or those advising her, but which were not included in the government's proffered record. For example, the record contains no materials from the Department of Justice or the White House—other than a one-page letter from Attorney General Jefferson B. Sessions—despite evidence that both bodies were involved in the decision to end DACA, including the President's own press release taking credit for the decision.[5] Nor does the proffered record include any documents from Acting Secretary Duke's subordinates; we agree with the district court that "it strains credulity" to suggest that the Acting Secretary decided to terminate DACA "without consulting one advisor or subordinate within DHS." Order at *4. And the proffered record contains no materials addressing the change of position between February 2017—when then-Secretary John Kelly affirmatively decided *not* to end DACA—and Acting Secretary Duke's September 2017 decision to do the exact opposite, despite the principle that reasoned agency decision-making "ordinarily de-

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tus Fiscal Year 2012-2017 (June 30) (Sept. 20, 2017), goo.gl/UcGJww.

[4] The dissent agrees that "a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand." Dissent at 1.

[5] *See* Press Release, White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law.

mand[s] that [the agency] display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

At oral argument, the government took the position that because the Acting Secretary's stated justification for her decision was litigation risk, materials unrelated to litigation risk need not be included in the administrative record. Simply put, this is not what the law dictates. The administrative record consists of all materials "*considered by* agency decision-makers," *Thompson*, 885 F.2d at 555 (emphasis added), not just those which support or form the basis for the agency's ultimate decision. *See also, e.g.*, *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] complete administrative record should include all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision.") (quoting *Bethlehem Steel v. EPA*, 638 F.2d 994, 1000 (7th Cir. 1980)). And even if the record were properly limited to materials relating to litigation risk, the district court did not clearly err in concluding that it is implausible that the Acting Secretary would make a litigation-risk decision "without having generated any materials analyzing the lawsuit or other factors militating in favor of and against the switch in policy." Order at *4.

It was therefore not clear error for the district court to conclude that the presumption of regularity that attaches to the government's proffered record is rebutted, and that ordering completion of the record was necessary and appropriate.

4. Nor did the district court clearly err in identifying the materials that should have been included within the scope of the complete administrative record. The government challenges the decision to include materials considered by subordinates who then briefed the Acting Secretary, but this decision was not clear legal error. We have held that the record properly includes "all documents and materials directly or *indirectly* considered by agency decision-makers," *Thompson*, 885 F.2d at 555, but have not yet clarified the exact scope of "indirectly considered." District courts in this and other circuits, however, have interpreted that phrase to include materials relied on by subordinates who directly advised the ultimate decision-maker. *See, e.g.*, *Nat. Res. Def. Council v. Gutierrez*, No. C 01-0421 JL, 2008 WL 11358008, at *6 (N.D. Cal. Jan. 14, 2008) ("To the extent [the government argues] that only those documents that reached [the agency's] most senior administrators were in fact 'considered,' courts have rejected that view as contrary to the Ninth and other Circuits' pronouncements. . . ."); *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 212 F. Supp. 3d 1348, 1352 (N.D. Ga. 2016) ("Documents and materials indirectly considered by agency decision-makers are those that may not have literally passed before the eyes of the decision-makers, but were so heavily relied on in the recommendation that the decisionmaker constructively considered them."); *Amfac Resorts*, 143 F. Supp. 2d at 12 ("[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well.").[6]

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[6] We also note that the government has conceded in other cases

Moreover, as noted in the district court's October 17 order, a Department of Justice guidance document directs agencies compiling the administrative record to "[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, *even though the final decision-maker did not actually review or know about the documents and materials.*" U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 3 (Jan. 1999) (emphasis added). It further provides that the administrative record should include "communications the agency received from other agencies . . . documents and materials that support *or* oppose the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and] memorializations of telephone conversations and meetings, such as a memorandum or handwritten notes." *Id.* at 3-4. The district court's October 17 order complies with this Department of Justice guidance; the government's proffered record does not.

We recognize that such guidance is not binding; we nevertheless find it persuasive as a statement by the Department of Justice as to what should be included in a complete administrative record. We also note that the guidance document DHS failed to comply with here

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that documents relied on by subordinates are properly part of the administrative record. *See Oceana, Inc. v. Pritzker*, No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *4 (N.D. Cal. June 21, 2017) ("Defendants acknowledge . . . that a decision-maker can be deemed to have 'constructively considered' materials that, for example, were relied on by subordinates. . . .").

was inexplicably rescinded the very same day that the government filed this petition for a writ of mandamus.

Given that the district court's interpretation of *Thompson* is consistent with the rulings of other district courts, comports with the Department of Justice's guidance on administrative records, and is not foreclosed by Ninth Circuit authority, we cannot say that the district court's interpretation was clearly erroneous as a matter of law. *See In re Swift Transp. Co.*, 830 F.3d 913, 916-17 (9th Cir. 2016) ("It is well established that '[t]he absence of controlling precedent weighs strongly against a finding of clear error [for mandamus purposes].'") (quoting *In re Van Dusen*, 654 F.3d at 845).[7]

5. The district court's order that the government complete the record with documents considered by former DHS Secretary John Kelly in the course of deciding not to terminate DACA in February 2017 also withstands mandamus scrutiny. This is not because of some freestanding requirement that all the materials underlying a previous decision on a similar subject are always part of the administrative record; rather, it simply recognizes that both decisions were part of an

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[7] There is tension within our decisions about whether controlling Ninth Circuit precedent is a *necessary* precondition to finding clear error as a matter of law. *Compare In re Swift Transp. Co.*, 830 F.3d at 917 ("If 'no prior Ninth Circuit authority prohibited the course taken by the district court, its ruling is not clearly erroneous.'") (quoting *In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007)), *with Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) ("[T]he necessary clear error factor does not *require* that the issue be one as to which there is established precedent.") (emphasis added). At a minimum, however, the lack of such authority "weighs strongly" against finding clear error. *In re Swift Transp. Co.*, 830 F.3d at 916.

ongoing decision-making process regarding deferred action: In February 2017, Secretary Kelly ended other prioritization programs, but left DACA and DAPA in place; in June 2017, Secretary Kelly ended DAPA but left DACA intact; finally, in September 2017, Acting Secretary Duke ended DACA. The materials considered by Secretary Kelly in the course of deciding against ending DACA in February 2017 did not cease to be "before the agency" for purposes of the administrative record during that seven-month evolution in policy. *Thompson*, 885 F.2d at 555-56. The district court's decision to order their inclusion in the record was therefore not clear legal error.

6. Finally, the government makes two categorical arguments with respect to privilege.[8] First, it contends that *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), bars the completion of the administrative record with any White House materials, because requiring White House officials to search for and assert privilege as to individual documents would be an unwarranted intrusion into executive decision-making. *Cheney*, of course, did not involve an administrative agency's obligation under the APA to provide the court with the record underlying its decision-making. It instead involved civil discovery requests that the Supreme Court described variously as "overbroad" and as "ask[ing] for everything under the sky." *Id.* at 383, 387. We do

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[8] The government also appears to challenge the district court's individual privilege determinations, but it has provided little in the way of argument regarding the specific documents ordered disclosed by the district court. We are unable to conclude that the government has met its burden of showing that the district court's privilege analysis was clearly erroneous as a matter of law.

not read *Cheney* as imposing a categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents.

Moreover, the reasoning of *Cheney* appears to be based substantially on the fact that the Vice President himself was the subject of discovery. *See id.* at 381 ("Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders."), 382 ("These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President."). Here, although the government is of course correct that the President is named as a defendant in some of the underlying lawsuits, there is no indication that either his documents or those of the Vice President would fall within the completed administrative record as ordered by the district court. *Cheney* therefore does not render the district court's order clearly erroneous.

Second, the government argues that it was clear legal error to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege on an individual basis, since "deliberative" materials are not properly within the administrative record at all. As noted above, the district court reviewed *in camera* each of the documents as to which the government asserted the deliberative process privilege, and ordered the inclusion of only those documents that met the balancing standard laid out in *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The court stated that it would similarly review

in camera any additional documents as to which the government claims privilege in the future. Order at *8.

As the government acknowledges, we have not previously addressed whether assertedly deliberative documents must be logged and examined or whether the government may exclude them from the administrative record altogether. However, many district courts within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases. *See, e.g., Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017); *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574 VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017); *California* ex rel. *Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *4 (N.D. Cal. March 16, 2008). Again, "the absence of controlling precedent" and the practice of the district courts "weigh[] strongly against a finding of clear error" for purposes of mandamus. *In re Swift Transp. Co.*, 830 F.3d at 916-17 (citation omitted).

We further note that the "deliberative" materials at issue in the main case cited by the government, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), were transcripts of literal deliberations among the members of a multi-member agency board. *See id.* at 44. Where—as in *Mothers for Peace*—an agency is headed by a multi-member board, the deliberations among those members are analogous to the internal mental processes of the sole head of an agency, and thus are generally not within the scope of the administrative record. *Cf. Portland Audubon*, 984 F.2d at 1549 (distinguishing *Mothers for Peace* as involving

"the internal deliberative processes of *the agency* [and] the mental processes of *individual agency members*") (emphases added). No such deliberations among a multi-member agency are at issue here. The district court's decision to require a privilege log and evaluate claims of privilege on an individual basis before including documents in the record was not clearly erroneous as a matter of law.

* * *

The district court's October 17, 2017 order represents a reasonable approach to managing the conduct and exigencies of this important litigation—exigencies which were dictated by the government's March 5, 2018 termination date for DACA. In order for the government to prevail in its request for the extraordinary remedy of mandamus, we must be "left with a definite and firm conviction that a mistake has been committed." *In re Bundy*, 840 F.3d at 1041 (quoting *In re United States*, 791 F.3d at 955). We are left with no such conviction here, and mandamus relief is therefore not appropriate.

Accordingly, the stay of proceedings entered on October 24, 2017 is lifted.

PETITION DENIED.

In re United States of America, No. 17-72917

WATFORD, Circuit Judge, dissenting:

I understand why the district court ordered the Department of Homeland Security (DHS) to provide a more fulsome administrative record. The agency's decision to rescind DACA will profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand. But the desire for greater insight into how DHS arrived at its decision is not a legitimate basis for ordering the agency to expand the administrative record, unless the plaintiffs make a threshold factual showing justifying such action. They have not done so here. As a result, I think the district court's order constitutes "a clear abuse of discretion," and the burden imposed by the order is exceptional enough to warrant the extraordinary remedy of mandamus. *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380 (2004).

The district court's order violates two well-settled principles governing judicial review of agency action under the Administrative Procedure Act. The first is that a court ordinarily conducts its review "based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). If the record compiled by the agency is inadequate to support the challenged action, the reviewing court will usually be required to vacate the agency's action and remand for additional investigation or explanation. *Florida Power*, 470 U.S. at 744.

So in most cases the agency bears the risk associated with filing an incomplete record, not the challengers.

The second principle is that documents reflecting an agency's internal deliberative processes are ordinarily not part of the administrative record. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983). An agency generally has no obligation to include documents that were prepared to assist the decision-maker in arriving at her decision, such as memos or emails containing opinions, recommendations, or advice. These pre-decisional materials are not deemed part of the administrative record because they are irrelevant to the reviewing court's task. The court's function is to assess the lawfulness of the agency's action based on the reasons offered by the agency, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983), not to "probe the mental processes" of agency decision-makers in reaching their conclusions. *Morgan v. United States*, 304 U.S. 1, 18 (1938). Requiring routine disclosure of deliberative process materials would also chill the frank discussions and debates that are necessary to craft well-considered policy. *See Assembly of the State of California v. Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 789 F.2d 26, 45 (D.C. Cir. 1986) (en banc) (plurality opinion).

There are exceptions to these general rules. First, expansion of the record may be required when the agency fails to make formal findings and thus leaves

the reviewing court unable to discern the agency's reasons for taking the action that it did. *See Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982). (This exception doesn't apply here because the memo issued by the Acting Secretary explicitly states her asserted reason for rescinding DACA: concern that the program would be invalidated in threatened litigation.) Second, the record may be expanded if there is evidence that the agency cherry-picked the materials it included by omitting factual information undermining the conclusions it reached. *See Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993). And third, documents reflecting an agency's internal deliberations may on occasion be made part of the record, but only if the challengers make "a strong showing of bad faith or improper behavior" on the part of agency decision-makers. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *In re Subpoena Duces Tecum*, 156 F.3d at 1279-80.

The plaintiffs have not made the showing necessary to trigger either of the latter two exceptions. They have not shown any likelihood that factual information considered by the Acting Secretary and relevant to her decision has been omitted from the record. Indeed, it would be implausible to think that any such material exists, given the nature of the reason asserted by the Acting Secretary for rescinding DACA. Concern over the program's vulnerability to legal challenge would rest not on factual information but on the legal analysis of lawyers. Documents analyzing DACA's potential legal infirmities, prepared to assist the Acting Secretary in assessing the gravity of the litigation risk in-

volved, fall squarely within the category of deliberative process materials mentioned above. They are presumptively outside the scope of what must be included in the administrative record (and may be privileged in any event).

Nor have the plaintiffs attempted at this stage of the case to show bad faith or improper behavior on the part of the Acting Secretary. To be sure, they assert in their brief that they suspect her stated reason for rescinding DACA is pretextual. But bare assertions of that sort fall far short of the showing needed to overcome the presumption that agency decision-makers have acted for the reasons they've given.

Because the plaintiffs have failed to establish that any of these exceptions apply, I don't think the district court's order can stand. The court directed DHS to include in the administrative record all DACA-related "emails, letters, memoranda, notes, media items, opinions, and other materials" considered by the Acting Secretary, and all such materials considered by any other government official—including officials from the Department of Justice and the White House—who provided the Acting Secretary with written or verbal input on the decision to rescind DACA. The court further expanded the record to include "all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses."

In my view, the district court exceeded the scope of its lawful authority to expand the administrative record. The order sweeps far beyond materials related to the sole reason given for rescinding DACA—its supposed unlawfulness and vulnerability to legal challenge.

The order requires the inclusion of all documents mentioning DACA-related issues of any sort, and is overbroad for that reason alone. But even if the order had been limited to documents analyzing the risk that DACA might be invalidated, those materials are deliberative in character and thus could not be made part of the administrative record absent a showing of bad faith or improper behavior. And to the extent the order will compel the production of communications between the Acting Secretary and high-level officials in the White House—including, potentially, the President himself—the order raises the same sensitive separation-of-powers concerns that made mandamus relief appropriate in *Cheney*. *See* 542 U.S. at 389-90.

These departures from settled principles are enough to establish that the district court's order is "clearly erroneous as a matter of law," which is the most important of the factors we consider when deciding whether to grant mandamus relief. *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016). The other factors weigh in favor of granting relief as well. The order isn't immediately appealable, and if relief is denied the harm inflicted will be immediate and irreparable. As the declarations submitted by the government attest, the search for documents responsive to the court's order will be burdensome and intrusive, given the large number of government officials who may have provided written or verbal input to the Acting Secretary. And the damage caused by public disclosure of otherwise privileged materials can't be undone following an appeal from the final judgment.

This strikes me as a classic case in which mandamus relief is warranted, and I would therefore grant the writ.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA, C 17-05329 WHA, C 17-05380 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Sept. 22, 2017]

CASE MANAGEMENT ORDER FOR ALL DACA ACTIONS IN THIS DISTRICT

After a case management conference at which counsel in all four cases spoke and with the benefit of some agreements, the Court now sets the following case management schedule for all DACA cases in this district:

1. The four above-numbered civil actions in this district all challenge the rescission of the DACA program by the United States Department of Homeland Security. All of these related cases

will be coordinated (and possibly later consolidated for trial) as follows.

2. The four sets of plaintiffs are referred to collectively herein as "all plaintiffs," and various defendants in the four cases are referred to collectively herein as "all defendants."

3. All parties shall serve their initial disclosures under FRCP 26, and all defendants shall file and serve the administrative record by **NOON ON OCTOBER 6, 2017.** After a party makes its FRCP 26 disclosure, it may take discovery. All plaintiffs shall be permitted to serve up to a combined total of **TWENTY INTERROGATORIES** and **TWENTY DOCUMENT REQUESTS**, all narrowly directed, plus a reasonable number of depositions. All defendants may serve an equal number of interrogatories and document requests plus a reasonable number of depositions. The time to respond to all discovery requests is cut in half. All discovery disputes are hereby **REFERRED** to **MAGISTRATE JUDGE SALLIE KIM** to be heard and determined on an expedited schedule.

4. A tutorial on DACA, the history of "deferred action," the history of APA rulemaking for deferred action programs and for analogous contexts, and immigration procedure generally is set for **OCTOBER 3, 2017, AT 8:00 A.M.** One or more counsel for each side shall present. Please avoid argument and adhere to updating the judge on the historical and administrative context.

5. Motions for summary judgment, provisional relief, or to dismiss are due by **NOON ON NOVEMBER 1, 2017.** All plaintiffs shall file one joint brief on their statutory claims, and another on their constitutional claims, each brief limited to **25 PAGES.** A plaintiff may, if truly essential, add a very short supplemental brief on any point unique to that plaintiff. All defendants may file a joint brief in support of their own motion of up to **50 PAGES** but the Court would prefer that the briefing be divided between two memoranda, one devoted to statutory claims and one devoted to constitutional claims, both adding to fifty or fewer pages. Any amicus brief must be filed on the same date as the brief it supports, each limited to **15 PAGES.** Amici may not submit evidentiary material, so their briefs should include everything within their 15 pages.

6. Summary judgment and provisional relief motions must be supported by proper declarations under oath. Simply attaching exhibits to briefs will not do. Foundation must be laid under oath. Motions to dismiss, however, need only be directed to the complaints, but if extraneous matter is referenced, then it too must be supported by declaration.

7. Oppositions are due by **NOON ON NOVEMBER 22, 2017.** The oppositions shall be organized to mirror the organization of the openings. No brief shall exceed the length of the relevant opening brief. All plaintiffs shall file a single joint opposition, and all defendants shall file a

single joint opposition, each party being permitted to file a short individual supplement to the extent truly needed for issues unique to that party.

8. There will be no page limit on declarations and exhibits, but please be reasonable. All exhibits for a side should be included in that side's joint and tabbed appendix of exhibits (the tabs should protrude for ease of reference). The "individual" exhibits should be included in the joint appendix as well. The exhibits should be numbered. The appendix, however, should not include any item already in the administrative record. Please highlight in yellow any cited passage. Declarations laying foundation for admissibility may simply refer to the exhibits by tab number.

9. Reply briefs are due by **NOON ON DECEMBER 8, 2017**. The replies shall be organized to mirror the organization of the openings (and the oppositions). The briefs shall not exceed half of the pages used in the opposition briefs to which they respond (not to exceed **30 PAGES** in any event). There shall be no reply declarations except for very good cause, the Court being of the view that it is unfair for a movant to deprive the other side of its chance to respond to evidentiary material. If a brief quotes from any deposition or other exhibit, then the brief should quote the entire passage, not just the helpful part. Please do the same for quotations from case law.

10. A hearing on all motions is set for **DECEMBER 20, 2017, AT 8:00 A.M.**

11. If necessary, a **BENCH TRIAL** will be held on **FEBRUARY 5, 2018, AT 7:30 A.M.**, with a **FINAL PRETRIAL CONFERENCE** to be held on **JANUARY 24, 2018, AT 2:00 P.M.**

For now, all filings should be made in any civil action to which they pertain *and*, for the sake of coordination, in the low-numbered action (No. C 17-05211 WHA). Counsel shall confer and recommend any better way of organizing the filing system for these cases, including, for example, the possibility of filing everything in the low-numbered action and thereby deeming it to be filed in all actions. Counsel may also stipulate to tweaks in the wording of this order (but not to its substance or timeline). Any such fully-stipulated modifications must be submitted by **SEPTEMBER 29, AT NOON**, failing which this order shall control.

IT IS SO ORDERED.

Dated: Sept. 22, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA,
C 17-05329 WHA, C 17-05380 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Oct. 17, 2017]

ORDER RE MOTION TO COMPLETE ADMINISTRATIVE RECORD

INTRODUCTION

Under the Administrative Procedure Act, plaintiffs seek to compel completion of the administrative record. Federal defendants oppose. For the reasons herein, plaintiffs' motion is **GRANTED IN PART** and **DENIED IN PART.**

STATEMENT

On June 15, 2012, the Secretary of the Department of Homeland Security issued a memorandum promul-

gating a deferred action policy for those without lawful immigration status who came to the United States as children, were continuous residents in the United States for at least five years, had graduated from high school, obtained a GED, or served in the military, and met certain other criteria—a memorandum and policy known as Deferred Action for Childhood Arrivals, "DACA" for short (Dkt. No. 64-1 at 1-3).[1]

After the change in administrations in 2017, the new Secretary of DHS, John Kelly, announced that DACA would be continued notwithstanding the rescission of other immigration policies (*id.* at 230). This was done despite, and with the knowledge of, the decision of the Court of Appeals for the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), invalidating a different deferred action policy and the Supreme Court's affirmance of that decision by an equally divided vote, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

On September 5, 2017, however, the Acting Secretary of DHS, Elaine Duke, reversed the agency's position and announced DACA's end, effective March 5, 2018.

We now have five lawsuits in this district challenging that rescission.[2] Each action is proceeding on a parallel track and on the same schedule, which sched-

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[1] All docket numbers herein refer to the docket in Case No. C 17-05211 WHA.

[2] There are two additional DACA lawsuits proceeding in the Eastern District of New York before Judge Nicholas Garaufis, *State of New York v. Trump*, Case No. 17-cv-05228 NGG, and *Vidal v. Baran*, Case No. 16-cv-04756 NGG.

ule was designed to reach a decision on the merits and to allow appellate review by the March 5 deadline.[3]

Pursuant to the scheduling order, the federal defendants filed the administrative record on October 6. It consisted of fourteen documents spanning 256 pages, each of which was already available to the public, and had, in fact, already been filed in this action (Dkt. No. 49 ¶ 3; Dkt. No. 64-1).

In unison, plaintiffs now move to require completion of the administrative record in accordance with Section 706 of Title 5 of the United States Code. They argue that the current record is incomplete because it contains only documents personally considered by the Acting Secretary (and then only some considered by her) and excludes any and all other documents that indirectly led to the rescission.

The federal defendants oppose, arguing that they have already filed a complete administrative record, which they contend is properly limited to unprivileged documents actually considered by the "decision-maker," here, the Acting Secretary (Opp. at 8-9).

This order follows full briefing and oral argument and the Court's review of all materials *in camera* that appeared on the government's privilege log.

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[3] The fifth lawsuit, *County of Santa Clara v. Trump*, Case No. 17-cv-05813 HRL, was related after plaintiffs' motion was fully briefed and argued.

ANALYSIS

1. SCOPE OF THE ADMINISTRATIVE RECORD.

Section 706 of the APA provides that judicial review of agency action shall be based on "the whole record." The administrative record "is not necessarily those documents that the agency has compiled and submitted as the administrative record" but rather "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989). This includes not only documents that "literally pass[ed] before the eyes of the final agency decision maker" but also documents that were considered and relied upon by subordinates who provided recommendations to the decisionmaker. *People of State of Cal. ex rel. Lockyer v. United States Dep't of Agriculture*, Nos. C05-3508 & C05-4038, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006) (Magistrate Judge Elizabeth Laporte) (internal citations and quotations omitted); *see also Amfac Resorts, L.L.C. v. United States Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (Judge Royce Lamberth).

The requirement that a reviewing court consider "the whole record" before rendering a decision "ensures that neither party is withholding evidence unfavorable to its position and that the agencies are not taking advantage of post hoc rationalizations for administrative decisions. *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

While it is presumed that the administrative record submitted by defendants is complete, plaintiffs can re-

but this presumption with "clear evidence to the contrary." *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)).

Defendants contend a showing of bad faith or impropriety is required in order to compel a complete production of the administrative record. This is incorrect. True, bad faith is one basis for requiring supplementation of an administrative record, but it is not the exclusive basis. Our court of appeals has repeatedly recognized other grounds for requiring supplementation, including where it appears the "agency relied on documents not [already] included in the record." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

The "bad faith" standard of *Overton Park* applies where, though an administrative record exists, plaintiffs ask to go beyond the record that was before the agency and inquire into the thought processes of decision-makers—in *Overton Park*, by taking the testimony of agency officials. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Our plaintiffs are not seeking materials beyond what were already considered, directly or indirectly, by the decision-maker, and therefore need not show bad faith. Supplementation is appropriate if they show, by clear evidence, that the agency relied on materials not already included in the record. *See Portland Audubon*

Soc. v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (distinguishing between materials "never presented to the agency" and materials that were "allegedly [] before the agency"); *Fence Creek Cattle Co.*, 602 F.3d at 1131.

Nor is defendants' contention that it need only produce documents directly considered by the Acting Secretary correct. Documents reviewed by subordinates, or other agencies who informed her on the issues underlying the decision to rescind DACA, either verbally or in writing, should be in the administrative record. *See Lockyer*, 2006 WL 708914, at *2. The threshold question is whether plaintiffs have shown, by clear evidence, that the record defendants produced is missing documents that were considered, directly or indirectly, by DHS in deciding to rescind DACA.[4]

2. PLAINTIFFS' SHOWING OF INCOMPLETENESS.

Here, the tendered administrative record consists merely of fourteen documents spanning 258 pages, which defendants contend constitute the entire record considered in making the decision to rescind DACA. These are plainly pertinent materials, although all

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[4] Defendants also argue that they should not be required to produce any administrative record whatsoever because the Department of Homeland Security's decision to end DACA was an exercise of prosecutorial discretion not subject to judicial review (Opp. at 1). Earlier in these actions, our defendants agreed to produce the administrative record by October 6, and were then ordered to do so. They may not now renege on that commitment. At this stage, defendants are required to produce an administrative record. Should they prevail on this argument on their eventual motion to dismiss, it will be with the benefit of a proper administrative record.

were publicly known and already part of the pleadings herein.

Plaintiffs seek additional materials including emails, departmental memoranda, policy directives, meeting minutes, materials considered by Secretary Duke's subordinates, communications from White House officials or staff, communications from the Department of Justice, and communications between DHS and state authorities, which they contend should necessarily be part of the administrative record (Br. at 9-10).

Plaintiffs drew this list, in part, from a United States Department of Justice Guidance, which sets forth non-binding recommendations for how to compile an administrative record and what to include. United States Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999). Specifically, the Guidance states that the administrative record should "[i]nclude all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not actually review or know about the documents and materials." *Id.* at 3. It further provides that the record should include "communications the agency received from other agencies . . . documents and materials that support *or* oppose the challenged agency decision . . . minutes of meetings or transcripts thereof . . . [and] memorializations of telephone conversations and meetings, such as memorandum or handwritten notes."[5]

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[5] A 2008 DOJ memorandum specifically notes that the 1999 Guidance is a non-binding internal document, which does not "limit the

Plaintiffs contend that communications from DOJ and the White House are a critical part of "the whole record" due to their significant public participation in the process of rescinding DACA. Plaintiffs first point to Attorney General Sessions' September 4 letter, which DHS expressly relied upon in its memorandum terminating the program (*see* Dkt. No. 64-1 at 251, 255). Despite this critical and publicly disclosed role in the decision, the only DOJ document defendants include in the record is this one-page September 4 letter. This, plaintiffs contend, is clear evidence that defendants omitted documents supporting (or contradicting) the opinions set forth in Attorney General Sessions' letter, in particular the opinion that DACA was unlawfully implemented.

Additionally, the White House has repeatedly emphasized the President's direct role in decisions concerning DACA. For example, a September 5 White House press release announced "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration" by rescinding DACA, and repeatedly stated that "President Trump" had acted to end the program. Press Release, The White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigra-

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otherwise lawful prerogatives of the Department of Justice or any other federal agency" (Dkt. No. 71-1 at 3). In particular, the 2008 memorandum takes issue with outside parties' use of the Guidance in litigation to advocate for a particular composition of the administrative record or process for its assembly (*ibid.*). Recognizing that the 1999 Guidance is not binding upon agencies, this order finds that the Guidance nevertheless provides helpful insight into the types of documents and materials an agency should consider when assembling an administrative record.

tion (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law. Other articles likewise emphasize White House officials' roles in decision-making regarding DACA. *See, e.g.*, Michael D. Shear & Julie Hirschfeld Davis, Trump Moves to End DACA and Calls on Congress to Act, *New York Times* (Sept. 5, 2017). Moreover, defendants concede in their response that Secretary Duke "received advice from other members of the executive branch" in making her decision (Opp. at 17) and refer to "White House memorandum" in their privilege log (Dkt. No. 71-2). And at oral argument, counsel for defendants said it was likely Secretary Duke had received verbal input before making her decision. Despite this, defendants have failed to provide even a single document from any White House officials or staff.

Plaintiffs further observe that not a single document from one of Secretary Dukes' subordinates is in the record. It strains credulity to suggest that the Acting Secretary of DHS decided to rescind a program covering 800,000 enrollees without consulting one advisor or subordinate within DHS. Again, at oral argument, government counsel represented that she had likely received verbal input. The government's *in camera* submission confirms that she did receive substantial DACA input.

Finally, former DHS Secretary John Kelly issued a memorandum in February 2017, in which he rescinded all DHS memoranda that conflicted with newly stated immigration enforcement policies—*but expressly declined to rescind DACA* (Dkt. No. 64-1 at 229-30). This decision, of course, is directly contrary to that

taken by Acting Secretary Duke seven months later. The administrative record, however, omits all materials explaining the change in position from February to September, with two exceptions—(1) a June 29 letter from Ken Paxton, the Attorney General of Texas, to Attorney General Sessions, in which he threatens to amend the suit challenging DAPA to also challenge DACA if it is not rescinded by September 5, and (2) Attorney General Sessions' September 4 letter to Secretary Duke expressing the opinion that DHS should rescind DACA. Reasoned agency decision-making ordinarily "demand[s] that [the agency] display awareness that it is changing position" and "show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Accordingly, "the whole record" would ordinarily contain materials giving a "reasoned explanation . . . for disregarding the facts and circumstances that underlay or were engendered by the prior policy." *Ibid.* It is simply not plausible that DHS reversed policy between February and September because of one threatened lawsuit (never actually filed) without having generated any materials analyzing the lawsuit or other factors militating in favor of and against the switch in policy.

Based on the foregoing, plaintiffs have clearly shown that defendants excluded highly relevant materials from the administrative record and in doing so have rebutted the presumption that the record is complete.

Defendants' argument to the contrary is unpersuasive. Their position that only selected documents that Acting Secretary Duke personally reviewed need be part of the administrative record must yield to legal

authority requiring both directly and *indirectly* considered documents be included in the record, *see, e.g.*, *Thompson*, 885 F.2d at 555-56, and by public statements illustrating both DOJ and the White House's direct involvement in the decision to rescind DACA. The rule that government counsel advocates would allow agencies to contrive a record that suppresses information actually considered by decision-makers and by those making recommendations to the decision-makers, information that might undercut the claimed rationale for the decision.

As stated, privilege log entries reveal several documents that were considered in arriving at the decision to rescind DACA. For example, at least seven entries refer to commentary in media articles regarding DACA. At oral argument, government counsel admitted that the Acting Secretary had seen several media items on the issue. There were not, however, any media articles on DACA in the administrative record, but those that came to the Acting Secretary should, of course, be included.[6]

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[6] Many documents were evidently excluded in their entirety based on an assertion of "deliberative-process" privilege. Any "[f]actual portions of documents covered by the deliberative process privilege, [however], must be segregated and disclosed unless they are so interwoven with the deliberative material" that they are not segregable. *See Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir 2008) (citations and quotations omitted). Accordingly, to the extent that media articles or other non-privileged factual materials were considered, they should have been included in the administrative record, and shall be filed as part of the amended administrative record, even if passages are redacted as deliberative, and called out as such in the privilege log.

Here, plaintiffs have rebutted the presumption of completeness. It is evident that Acting Secretary Duke considered information directly, or indirectly, through the advice of other agencies and others within her own agency. These documents, as set forth in detail below, should be made part of the administrative record and must be produced by defendants in an amended administrative record by **NOON ON OCTOBER 27.**

3. **WAIVER OF ATTORNEY-CLIENT PRIVILEGE.**

Plaintiffs next argue that defendants have waived attorney-client privilege because they have put their attorneys' legal opinions at issue by arguing that the rescission was required due to concerns over DACA's legality (Br. at 15-16). Indeed, one of DHS's primary rationales for rescinding DACA was its purported illegality (*see* Dkt. No. 64-1 at 253-56 (Rescission Memorandum)).

Parties are not permitted to advance conclusions that favor their position in litigation, and at the same time shield the information that led to those conclusions from discovery. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Put differently, "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Ibid.* Where a party raises a claim, which in fairness to its adversary requires it to reveal the information or communication that claim is predicated upon, it has implicitly waived any privilege over that communication.

Here, defendants argue that DHS had to rescind DACA because it exceeded the lawful authority of the agency. They cannot, therefore, simultaneously re-

fuse to disclose the legal research that led to that conclusion. Defendants indeed, have included the September 4 legal opinion of the Attorney General, pithy as it may be—yet they seek to conceal all other legal analysis available to the Acting Secretary and to the Attorney General.

Significantly, defendants slide into a backup argument that the agency's legal worry was "reasonable" even if wrong. If this backup argument comes into play (as government counsel posits) then the "reasonableness" of taking an incorrect legal position would heavily turn on the underlying legal analysis so far withheld from view. In other words, assessing the reasonableness of the Secretary's legal rationale would turn, in part, on how consistent the analysis has been in the runup to the rescission.

Defendants' arguments to the contrary are unavailing. They first argue, without citation to any legal authority, that "[w]ere plaintiffs' argument accepted, the government would be deemed to have waived all privileges any time an assessment of the legal landscape informed an agency's decisionsmaking" (Opp. at 21). This argument vastly exaggerates plaintiffs' position, and misrepresents the position defendants have staked out in this litigation. DHS specifically relied upon DOJ's assessment that DACA "was effectuated . . . without proper statutory authority," "was an unconstitutional exercise of authority by the Executive Branch" and "has the same legal and constitutional defects that courts recognized as to DAPA" (Dkt. No. 64-1 at 254). Plaintiffs are entitled to challenge whether this was a reasonable legal position and thus a reasonable basis for rescission. In making that challenge, plaintiffs are

entitled to review the internal analyses that led up to this change in position.

Defendants further argue that the decisions cited by plaintiffs are inapplicable because they arose in different contexts than the present action. True, the decisions plaintiffs cite did not arise in identical circumstances. *E.g. Chevron Corp.*, 974 F.2d at 1162 (defendant prohibited from relying on legal opinion that tax position was reasonable while refusing to disclose the attorney communications leading to that conclusion). They still, however, stand for the widely-accepted proposition that it is unfair for a litigant to defend his action with a selective disclosure of evidence. This principle carries no less force here.

In the related context of FOIA, the Court of Appeals for the Second Circuit held that "the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into an agency's policy." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005). There, DOJ invoked the reasoning of an OLC memorandum to justify its new position on an immigration issue. *Id.* at 357. The court held that the agency's "view that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA." *Id.* at 360. So too here.

Defendants have waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded.

4. DELIBERATIVE-PROCESS PRIVILEGE BALANCING.

Defendants further assert the deliberative-process privilege over many documents.

The deliberative-process privilege, however, is qualified and will yield when the need for materials and accurate fact-finding "override the government's interest in non-disclosure." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "Among factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Ibid.*

As set forth below, the judge has personally reviewed *in camera* all materials on the privilege log and applied the foregoing test to each document for which the deliberative-process privilege is claimed.[7]

5. PRIVILEGE LOG REQUIREMENT.

While defendants did not file a privilege log with their original production, they have since, pursuant to order, filed a privilege log claiming attorney-client or deliberative-process privilege over 84 documents considered by Secretary Duke but not included in the administrative record (Dkt. Nos. 67; 71-2). Nevertheless, defendants argue that privilege logs are not generally

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[7] Although not addressed in the brief or at oral argument, the privilege log referenced personal privacy and executive privilege objections for certain documents. No substantial privacy interest is implicated in any of the documents ordered to be produced below, nor do any of these documents fall within the executive privilege.

required in connection with an administrative record and that one should not be required here.

Our court of appeals has not spoken on the issue. Every court in this district considering the issue, however, has required administrative agencies to provide a privilege log. *See, e.g., Ctr. for Food Safety v. Vilsack*, No. 15CV01590HSGKAW, 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017) (Magistrate Judge Kandis Westmore) ("[C]ourts in this district have required parties withholding documents on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a privilege log."); *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (Judge Vince Chhabria); *Lockyer*, 2006 WL 708914, at *4.

"If a privilege applies, the proper strategy isn't pretending the protected material wasn't considered, but withholding or redacting the protected material and then logging the privilege." *Inst. for Fisheries Res.*, 2017 WL 89002 at *1.[8]

Courts outside this district that have determined no privilege log was required have done so on the grounds that the defendants' judgment of what constitutes the administrative record is entitled to a presumption of correctness. *See San Luis & Delta-Mendota Water Auth.*

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[8] In a memorandum opinion, our court of appeals denied a plaintiff's request to require a privilege log. *See Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (2010). In that decision, however, our court of appeals first denied a motion to supplement the record, and finding that the plaintiffs had not presented evidence that the agency had considered the documents the plaintiffs sought to compel, only then denied the accompanying motion for preparation of a privilege log without further explanation.

v. Jewell, No. 115CV01290LJOGSA, 2016 WL 3543203, at *19 (E.D. Cal. June 23, 2016) (Judge Lawrence O'Neill); *Nat'l Ass'n of Chain Drug Stores v. United States Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009). Here, however, that presumption has been overcome by plaintiffs' showing that defendants failed to include documents considered in arriving at the final decision to rescind DACA in the administrative record. Therefore, even applying those courts' logic, a privilege log would still be appropriate here.

Going forward, defendants shall comply with the standing order in this case and provide a privilege log for all documents withheld on grounds of privilege, which log shall include all authors and recipients of privileged documents, as well as other information set forth in the rule (*see* Dkt. No. 23 ¶ 18).

RELIEF ORDERED

Plaintiffs' motion to complete the administrative record is **GRANTED** to the extent now stated. Defendants are directed to complete the administrative record by adding to it all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA, to the following extent: (1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with the potential or actual decision to rescind DACA (except as stated in the next paragraph below), (2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with written advice or input regarding the actual or potential rescission of DACA, (3) all DACA-related

materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with verbal input regarding the actual or potential rescission of DACA, (4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses, and (5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA.

The undersigned judge has balanced the deliberative-process privilege factors and determined *in camera* that the following materials from the government's *in camera* submission, listed by tab number, shall be included in the administrative record: 1-6, 7 (only the header and material on pages 3-4 concerning DACA), 12, 14, 17-25, 27-30, 36, 39, 44, 47, 49 (only the first paragraph, and the paragraph captioned "General"), 69-70, 73-74, 77, 79, 81, 84. The remainder of the *in camera* submission need not be included.

If the government redacts or withholds any material based on deliberative-process, or any other privilege in its next filing, it shall simultaneously lodge full copies of all such materials, indicating by highlighting (or otherwise) the redactions and withholdings together with a log justification for each. The judge will review and rule on each item.

Plaintiffs' insistence that defendants scour the Department of Justice and the White House for documents for inclusion in the administrative record is overruled except to the limited extent that DOJ or White House personnel fall within the category described in the first paragraph above as someone who

gave verbal or written input to the Acting Secretary. Nor do defendants have to search for DACA materials below the agency levels indicated in the first paragraph above. These are intended as practical limits on what would otherwise be a bone-crushing expedition to locate needles in haystacks.

This order, however, is not intended to limit the scope of discovery (as opposed to the scope of the administrative record). The scope of discovery over and above the administrative record continues to be managed by Magistrate Judge Sallie Kim.

The federal defendants shall file an amended administrative record in conformity with this order by **NOON ON OCTOBER 27.**

If any party plans to seek a writ of mandate and wants a stay pending appellate review, then a fresh motion to that effect must be made very promptly.

IT IS SO ORDERED.

Dated: Oct. 17, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Nos. C 17-05211 WHA, C 17-05235 WHA, C 17-05329 WHA, C 17-05380 WHA, C 17-05813 WHA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY AND ELAINE DUKE, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DEFENDANTS

[Nov. 20, 2017]

ONE-MONTH CONTINUANCE OF DUE DATE FOR AUGMENTED ADMINSTRATIVE RECORD AND TEMPORARY STAY OF DISCOVERY

After consideration of all briefing, the Court stands by its tentative order.

The previous schedule is hereby modified to allow the government an additional month to compile and to file the augmented administrative record, which due date will now be **DECEMBER 22, 2017, AT NOON.** Although the government need not file until that date, it must promptly locate and compile the additional mate-

rials and be ready to file the fully augmented record by December 22, this caution being necessary in order to have a realistic opportunity to reach a final decision on the merits before the March 5 termination date. Additionally, all discovery is hereby **STAYED** until **DECEMBER 22, 2017, AT NOON.**

Meanwhile, we will proceed with the motion to dismiss and competing motion for provisional relief as scheduled. If the motion to dismiss is denied, then we will promptly set a practical schedule to reach the merits with the benefit of the augmented record.

Except to the foregoing extent, both emergency motions for stay are **DENIED.**

IT IS SO ORDERED.

Dated: Nov. 20, 2017.

/s/ WILLIAM ALSUP
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX E

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR:

David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
/s/ JANET NAPOLITANO
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and

know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they

designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are <u>in</u> removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

/s/ JANET NAPOLITANO
JANET NAPOLITANO

APPENDIX F

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Nov. 20, 2014

MEMORANDUM FOR:

León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
/s/ JEH CHARLES JOHNSON
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.* The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

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[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization")*; INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c)(d) Pub. L. 108-136 *(spouse, parent or child of certain US. citizen who died as a result of honorable service may self-petition for*

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Pro-

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permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

vided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June

2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act.[4] Deferred action granted

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the em-

pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.
- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process

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ployment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the [Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).

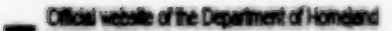
to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

APPENDIX G



Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)

Release Date: Sept. 5, 2017

MEMORANDUM FOR:

James W. McCament
Acting Director
U.S. Citizenship and Immigration Services

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Kevin K. McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Joseph B. Maher
Acting General Counsel

Ambassador James D. Nealon
Assistant Secretary, International Engagement

Julie M. Kirchner
Citizenship and Immigration Services Ombudsman

FROM:

Elaine C. Duke
Acting Secretary

SUBJECT:

Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"

This memorandum rescinds the June 15, 2012 memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which established the program known as Deferred Action for Childhood Arrivals ("DACA"). For the reasons and in the manner outlined below, Department of Homeland Security personnel shall take all appropriate actions to execute a wind-down of the program, consistent with the parameters established in this memorandum.

Background

The Department of Homeland Security established DACA through the issuance of a memorandum on June 15, 2012. The program purported to use deferred action—an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis—to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law.[1] Specifi-

[1] Significantly, while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria

cally, DACA provided certain illegal aliens who entered the United States before the age of sixteen a period of deferred action and eligibility to request employment authorization.

On November 20, 2014, the Department issued a new memorandum, expanding the parameters of DACA and creating a new policy called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Among other things—such as the expansion of the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and lengthening the period of deferred action and work authorization from two years to three—the November 20, 2014 memorandum directed USCIS "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," to certain aliens who have "a son or daughter who is a U.S. citizen or lawful permanent resident."

Prior to the implementation of DAPA, twenty-six states—led by Texas—challenged the policies announced in the November 20, 2014 memorandum in the U.S. District Court for the Southern District of Texas. In an order issued on February 16, 2015, the district court preliminarily enjoined the policies nationwide.[2] The district court held that the plaintiff states were likely to succeed on their claim that the DAPA program did not comply with relevant authorities.

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as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion.

[2] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

The United States Court of Appeals for the Fifth Circuit affirmed, holding that Texas and the other states had demonstrated a substantial likelihood of success on the merits and satisfied the other requirements for a preliminary injunction.[3] The Fifth Circuit concluded that the Department's DAPA policy conflicted with the discretion authorized by Congress. In considering the DAPA program, the court noted that the Immigration and Nationality Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization." According to the court, "DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."

Although the original DACA policy was not challenged in the lawsuit, both the district and appellate court decisions relied on factual findings about the implementation of the 2012 DACA memorandum. The Fifth Circuit agreed with the lower court that DACA decisions were not truly discretionary,[4] and that DAPA and expanded DACA would be substantially similar in execution. Both the district court and the Fifth Circuit concluded that implementation of the program did not comply with the Administrative Procedure Act because the Department did not implement it through notice-and-comment rulemaking.

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[3] *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[4] *Id.*

The Supreme Court affirmed the Fifth Circuit's ruling by equally divided vote (4-4).[5] The evenly divided ruling resulted in the Fifth Circuit order being affirmed. The preliminary injunction therefore remains in place today. In October 2016, the Supreme Court denied a request from DHS to rehear the case upon the appointment of a new Justice. After the 2016 election, both parties agreed to a stay in litigation to allow the new administration to review these issues.

On January 25, 2017, President Trump issued Executive Order No. 13,768, "Enhancing Public Safety in the Interior of the United States." In that Order, the President directed federal agencies to "[e]nsure the faithful execution of the immigration laws . . . against all removable aliens," and established new immigration enforcement priorities. On February 20, 2017, then Secretary of Homeland Security John F. Kelly issued an implementing memorandum, stating "the Department no longer will exempt classes or categories of removable aliens from potential enforcement," except as provided in the Department's June 15, 2012 memorandum establishing DACA,[6] and the November 20, 2014 memorandum establishing DAPA and expanding DACA.[7]

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[5] *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

[6] Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm'r, CBP, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012).

[7] Memorandum from Jeh Johnson, Secretary, DHS, to Leon Rodriguez, Dir., USCIS, et al., "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as

On June 15, 2017, after consulting with the Attorney General, and considering the likelihood of success on the merits of the ongoing litigation, then Secretary John F. Kelly issued a memorandum rescinding DAPA and the expansion of DACA—but temporarily left in place the June 15, 2012 memorandum that initially created the DACA program.

Then, on June 29, 2017, Texas, along with several other states, sent a letter to Attorney General Sessions asserting that the original 2012 DACA memorandum is unlawful for the same reasons stated in the Fifth Circuit and district court opinions regarding DAPA and expanded DACA. The letter notes that if DHS does not rescind the DACA memo by September 5, 2017, the States will seek to amend the DAPA lawsuit to include a challenge to DACA.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." Nevertheless,

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Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents" (Nov. 20, 2014).

in light of the administrative complexities associated with ending the program, he recommended that the Department wind it down in an efficient and orderly fashion, and his office has reviewed the terms on which our Department will do so.

Rescission of the June 15, 2012 DACA Memorandum

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters specified below. Accordingly, effective immediately, the Department:

- Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by the Department as of the date of this memorandum.

- Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum.

- Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for Employment

Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017.

- Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above.

- Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.

- Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole. Notwithstanding the continued validity of advance parole approvals previously granted, CBP will—of course—retain the authority it has always had and exercised in determining the admissibility of any person presenting at the border and the eligibility of such persons for parole. Further, USCIS will—of course—retain the authority to revoke or terminate an advance parole document at any time.

- Will administratively close all pending Form I-131 applications for advance parole filed under

standards associated with the DACA program, and will refund all associated fees.

- Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate.

This document is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

APPENDIX H

1. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

2. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus pro-

vision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of

constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every

provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative find-

ings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

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[1] See References in Text note below.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas

corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with ap-

plicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of

this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

No. 17-801

IN THE
Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of California

Brief for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, Jirayut Latthivongskorn, the County of Santa Clara, and Service Employees International Union Local 521 in Opposition

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QUESTION PRESENTED

Since 2012, the Deferred Action for Childhood Arrivals program (DACA) has enabled nearly 800,000 undocumented individuals who were brought to the United States as children to live and work without fear of deportation. The President has reaffirmed the government's commitment to DACA. But in September 2017, the Acting Secretary of Homeland Security abruptly decided to terminate the program.

Respondents brought suit to challenge that decision. The district court directed the government to produce the record on which the decision was made. The government produced an administrative record of only 14 publicly available documents—obviously not the entire basis for determining the fate of the 800,000 Dreamers. The district court therefore ordered the government to compile the "whole record." 5 U.S.C. § 706. The government identified and claimed privilege for 84 additional documents; the court reviewed them *in camera* and ordered that only 35 of them be included in the record. Regarding discovery, the court, at the government's request, limited the number of interrogatories, requests for document production, and depositions. The court has not yet ordered the government to produce any item in discovery.

The question presented is:

Whether the extraordinary remedy of mandamus is justified here, where the district court has required the government to complete the administrative record with non-privileged material to permit judicial review of the decision to eliminate DACA, and the court has not ordered the government to produce any particular materials in discovery.

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BRIEF IN OPPOSITION

This case is about whether 800,000 young adults who came to the United States as undocumented immigrant children and have lived their entire lives here will be subject to removal because the government decided to rescind the Deferred Action for Childhood Arrivals (DACA) program. Since 2012, DACA has allowed these individuals, known as "Dreamers," to obtain an education, work, and contribute to our Nation. The program has been an unqualified success, and DACA recipients have relied on the federal government's repeated promises of protection from removal.

In September 2017, the federal government dramatically reversed course and announced that it would terminate DACA as of March 5, 2018. The fate of the Dreamers has captured the attention of the administration, Congress, and millions of Americans who worry about the devastating impact that terminating DACA will have on families, schools, communities, and our economy.

Respondents brought this lawsuit to challenge the government's decision to end DACA. To evaluate that challenge, the district court directed the government to compile the record on which the decision was made, as is required under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Surprisingly, the government submitted an administrative record consisting only of 14 publicly available documents—which the government admits did not include all materials used to make the decision. The district court therefore directed the government to complete the administrative record. The court did not order the government to

turn over documents willy nilly—rather, the court reviewed each additional document the government supplied *in camera* and considered any claims of privilege, ultimately ordering production of less than half of the additional documents. With respect to respondents' non-APA claims, the court ordered only limited discovery, and it has not ordered the government to comply with any specific discovery request.

The court of appeals reviewed the district court's work and concluded that the district court took "a reasonable approach to managing the conduct and exigencies of this important litigation." Pet. App. 15a.

The government now seeks mandamus from this Court to relieve it of its statutory obligation to compile the full record used to make the momentous decision to end DACA. The government also seeks to stop all discovery on respondents' non-APA claims. This Court should not take those drastic steps. The courts below applied settled principles of agency review—including the principle that review occurs on the "whole record," meaning "the full administrative record that was before the [agency] at the time [it] made its decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). And there is no reason for this Court to prevent discovery before the district court has even entered any order requiring production.

Mandamus is particularly unwarranted because it is the *government*—not the district court—that seeks to upend the normal process of judicial review. The government's position boils down to an assertion that the Executive, not the Judiciary, sets the rules for review of administrative agency decisions. That is not

the law. And having a full record for judicial review is especially important here, where the government abruptly reversed position, to the detriment of the 800,000 people who have been relying on DACA to order their lives. This Court should deny the petition for a writ of mandamus and allow judicial review to proceed.

OPINIONS BELOW

The order of the court of appeals denying a petition for a writ of mandamus (Pet. App. 1a–20a) is not yet reported in the Federal Reporter but is available at 2017 WL 5505730. The order of the district court requiring completion of the administrative record (Pet. App. 26a–44a) is not published in the Federal Supplement but is available at 2017 WL 4642324. Two additional orders of the district court (Pet. App. 21a–25a, 45a–46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1651 and 1254(1).

STATEMENT

1. The DACA program gives young adults who were brought to the United States as children the opportunity to lawfully live and work in this country. Pet. App. 47a–51a. In particular, DACA permits qualifying undocumented immigrants to obtain work authorization and a social security number, open a bank account or credit card account, purchase a home or car, and travel overseas and lawfully return to the

United States. *See* D.Ct. Dkt. 121-1 at 1787–88[1]; D.Ct. Dkt. 1-2 at 18–19; Compl. ¶¶ 27–32.[2] Nearly 800,000 people have benefited from DACA since it was established in 2012. Compl. ¶ 1.

The Dreamers have relied on the promise of DACA to further their education, serve in the U.S. military, open businesses, start families, and make many other life-changing decisions. *See, e.g.*, *id.* ¶¶ 37, 41, 48–98. Like so many other DACA recipients, the six individual respondents here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn—embody the American Dream. Each has achieved remarkable success through hard work, fierce determination, and incredible resilience. *Id.* ¶¶ 4–9. DACA has created pathways for them to become lawyers, medical professionals, and teachers—professions chosen because of their deep commitment to public service. *Id.* ¶¶ 53–55; 59–61; 72–75; 78–81; 85–89; 95–98. Without DACA, these individuals will have to choose between the prospect of deportation—leaving behind their families, communities, professions, and the only country most have ever known—and returning to the shadows in an effort to avoid deportation. *Id.* ¶¶ 48–49, 56, 63, 76, 83, 91, 128.

The local, state, and federal governments have realized many administrative, law enforcement, economic, and public-safety benefits from DACA. *Id.*

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[1] "D.Ct. Dkt." refers to the electronic docket for *Regents of the University of California v. DHS*, Case No. 3:17-cv-05211 (N.D. Cal.).

[2] "Compl." refers to the complaint filed in *Garcia v. United States*, Case No. 3:17-cv-05380 (N.D. Cal.).

¶ 19. In December 2016, then-Secretary of Homeland Security Jeh Johnson said that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." *Id.* ¶ 41. After the change in administration, the government affirmed its commitment to DACA. In March 2017, then-Secretary of Homeland Security John Kelly stated that DACA embodies a "commitment . . . by the government towards the DACA person, or the so-called Dreamer." *Id.* ¶ 46. In April 2017, the President personally assured DACA recipients they could "rest easy" and confirmed that the "policy of [his] administration [is] to allow the dreamers to stay." *Id.* ¶ 47.

2. On September 4, 2017, the administration abruptly reversed course. The Attorney General sent a one-page letter to Acting Secretary of Homeland Security Elaine Duke, summarily concluding that "DACA was effectuated by the previous administration through executive action, without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." *Id.* ¶ 118. The next day, he announced the government's decision to end DACA. *Id.* ¶ 119.

Acting Secretary Duke then issued a memorandum formally rescinding DACA. Pet. App. 61a–69a. Her memo referred to the Attorney General's letter and stated that the threat of litigation prompted the decision to terminate DACA. *See id.* at 67a. It did not analyze the purported litigation risk (10 States had threatened to sue the government, but 20 States opposed that effort, Compl. ¶¶ 115–16), and it did not weigh DACA's widespread benefits against the many

harms that would befall DACA recipients, their families and employers, and the national economy if DACA were rescinded. Acting Secretary Duke then released a statement where she said—directly contrary to the President's and the prior Secretary's statements—that "DACA was fundamentally a lie." D.Ct. Dkt. 121-2 at 1869.

3. Given the government's change in position and the certain harms that will result from the Acting Secretary's decision, respondents sued the federal government and various federal officials. Respondents challenge DACA's termination on constitutional, statutory, and equitable grounds. In essence, they seek basic judicial review of an Executive Branch decision that will hurt 800,000 DACA recipients, as well as their families and communities, in profound and irreversible ways.

The district court immediately took steps to ensure that the litigation would proceed in an orderly and timely manner. In an initial case management conference, the court discussed how to manage the case in light of the government's March 2018 deadline for rescinding DACA. Stay Opp. Add. 7–8. The government agreed that getting "to final judgment quickly makes a lot of sense in this case" and said that it was "prepared to brief this case quickly." *Id.* at 18.

The court accordingly selected October 6 as the deadline for producing the administrative record and November 1 for filing dispositive motions. *Id.* at 18, 51. The court advised the government that the administrative record should contain all materials used in the decision to rescind DACA, not just "the select stuff

that supports your side." *Id.* at 17–18. The government agreed to produce the record by the deadline. *Id.* at 17.

As for discovery, the district court decided that, to expedite the litigation, the government "should respond to [respondents'] discovery requests if they're reasonable." *Id.* at 22. The court assured the government that if discovery "gets going too far sideways, I'll put a stop to it." *Ibid.* The government did not object to discovery but instead proposed limits on the number of discovery requests allowed. *Id.* at 55. The court agreed and limited respondents' collective discovery to 20 interrogatories, 20 requests for production, and a "reasonable number" of depositions. Pet. App. 22a. Respondents have served discovery requests that comply with those limits. The government made six witnesses available for depositions but has not responded to the written interrogatories or produced any responsive documents. Notably, the government has not challenged any specific discovery request in the district court, and the district court has not issued any order compelling the government to provide discovery.

4. The government produced an administrative record—an exceedingly sparse one. It consisted of only 14 publicly available documents, mostly judicial opinions, for a total of 256 pages. D.Ct. Dkt. 64, 64-1. It included only some of the documents that Acting Secretary Duke personally reviewed, and no documents considered by her direct advisors.

That limited record was surprising, because the fate of the Dreamers is a national issue affecting 800,000 people, and various administration officials

(including the President) have publicly expressed views about it. Respondents therefore asked the district court to require the government to complete the administrative record, including with documents considered by the Acting Secretary's advisors. D.Ct. Dkt. 65.

Sensitive to potential claims of privilege, the district court decided to review *in camera* any documents for which the government claimed privileges, including "emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D.Ct. Dkt. 67 at 1. The government submitted a privilege log listing 84 new documents—again, only documents considered by the Acting Secretary herself. Pet. App. 40a; Pet. 21, 29.

After *in camera* review, briefing, and argument, the district court partially granted respondents' motion to complete the administrative record. Pet. App. 26a–44a. The court found "clear evidence" that the government had failed to include in the proffered record "documents that were considered, directly or indirectly, by DHS in deciding to rescind DACA." *Id.* at 31a. The court explained that the "government's *in camera* submission confirms that [the Acting Secretary] did receive substantial DACA input" from others. *Id.* at 34a. The court also held that the government waived attorney-client privilege by placing government officials' legal analysis directly at issue; litigation risk was the sole reason the Acting Secretary cited in terminating DACA. *Id.* at 39a. The court accepted many of the government's claims of privilege, completely withholding 49 documents and partially withholding another two. *Id.* at 40a, 43a. It also promised that when the government provides the

complete record, the court will review *in camera* any documents for which the government claims privilege. *Id.* at 43a.

5. The government filed an emergency mandamus petition with the court of appeals, which the court denied. Pet. App. 1a–20a. The court of appeals concluded that the district court took "a reasonable approach to managing the conduct and exigencies of this important litigation." *Id.* at 15a. The court agreed that respondents had rebutted "the presumption of regularity that attaches to the government's proffered record," observing that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." *Id.* at 6a–7a (footnote omitted). The court also rejected the government's broad claim of privilege, explaining that there is no "categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 12a–13a.

The government also had sought an order precluding all discovery on respondents' non-APA claims. C.A. Dkt. 1-2 at 1, 30. But the district court had not ordered the government to produce anything, and so the court of appeals concluded that discovery issues "are not properly before [the Court] at this time" and therefore "d[id] not address them." Pet. App. 2a–3a n.1; *see also* Resp. C.A. Br. 1–2, 28–29.

Judge Watford dissented. Pet. App. 16a–20a. Although he recognized that "a policy shift of th[is] magnitude presumably would not have been made without

extensive study and analysis," *id.* at 16a, he believed that respondents had not made a sufficient showing to justify adding to the proffered record, *id.* at 17a–19a.

6. The district court ordered defendants to file the "complete administrative record" by November 22. D.Ct. Dkt. 188 at 1. The government sought an emergency stay pending the filing of its petition in this Court, first in the court of appeals (which dismissed the motion on jurisdictional grounds, C.A. Dkt. 42) and then in the district court, D.Ct. Dkt. 191. The district court declined to stay its order but extended the deadline for filing the administrative record to December 22 and stayed discovery until that date. D.Ct. Dkt. 193, 193-1.

The government filed a stay motion in this Court, which was granted over the objection of four Justices.

ARGUMENT

The government seeks truly extraordinary relief: mandamus to overturn the district court's order to provide the complete administrative record and to preclude all discovery on the non-APA claims in the case. To justify mandamus, the government must establish that the district court took an action so far outside its normal role that the only option is for this Court to intervene. *See Will v. United States*, 389 U.S. 90, 95 (1967). The government has not satisfied that high burden in this case. Nor has the government demonstrated that certiorari is warranted to review the district court's fact-bound application of settled principles of administrative law. The petition therefore should be denied.

I. The government has failed to justify mandamus

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). To establish a basis for mandamus, the government must show that (1) it has no other adequate means to obtain relief; (2) its right to mandamus relief is "clear and indisputable"; and (3) mandamus is "appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also* S. Ct. R. 20.1. None of those requirements has been met.

A. The government has adequate means to obtain relief from the lower courts

The government makes essentially three arguments regarding alternative avenues for relief. Each is mistaken.

First, the government contends (Pet. 18) that complying with the district court's orders will be a burden. But the government already has identified the documents that potentially will be added to the administrative record. It made available (for *in camera* review) 84 additional documents over which it asserted claims of privilege. *See* D.Ct. Dkt. 71-2. And it identified approximately 6,000 additional documents to review for possible inclusion in the administrative record. Stay Appl. 14.[3] The government told respondents

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[3] That is consistent with the size of other administrative records underlying important decisions. *E.g.*, *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 184 (5th Cir. 1989); *Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1208 (11th Cir. 2012).

it could compile those documents in three weeks. Stay Opp. Add. 74.

The relevant question is not burden but whether the government has avenues other than mandamus in this Court to test the district court's case-management orders. It plainly does. The district court's most recent order denied a stay and ordered the government to produce the record by December 22. If the government wishes not to comply, it can seek an extension of time in the district court or seek review of the order in the court of appeals. *See* Pet. App. 2a. To the extent the government complains about timing, that is attributable to the government's unilateral decision to terminate DACA in March 2018. The government created the exigency here.

Second, the government claims (Pet. 18) that, absent mandamus, "various privileges . . . will have been breached." That ignores the district court's *in camera* document-by-document evaluation of claims of privilege. *See, e.g.*, *Kerr*, 426 U.S. at 405–06 ("[I]n camera review is a highly appropriate and useful means of dealing with claims of governmental privilege."). The district court did not just order the government to turn over documents; it requested a privilege log, carefully reviewed the documents, and protected more than half of them from disclosure. And for future filings, the district court has pledged to review any documents for which the government claims privilege *in camera*, Pet. App. 43a; if the court orders production, the government may seek review in the court of appeals.

Significantly, the government has not challenged any particular privilege ruling of the district court.

See Pet. App. 12a n.8 (government "provided little in the way of argument regarding the specific documents ordered disclosed by the district court"). If the government disagrees with a privilege ruling, it should explain why—to the court of appeals in the first instance—rather than levying broad and unfounded attacks on the district court.

Third, the government asserts (Pet. 18) that it will be subject to unwarranted discovery. That claim is particularly far-fetched, because the district court *has not ordered the government to comply with any discovery request.* All the court has done is to place limits on discovery, at the government's request, and ask the government to respond to discovery requests "if they're reasonable." Stay Opp. Add. 22. The government has voluntarily produced six witnesses for deposition (who refused to answer many questions on grounds of privilege) and has yet to respond to any of respondents' discovery requests. If the government objects to a particular request, the district court can consider the reasons for the objection and decide whether to enter a protective order, quash the discovery request, or order compliance. Those types of rulings are well within the district court's purview. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). If the government dislikes the court's ruling, it can seek review from the court of appeals. What it cannot do is enlist this Court to preemptively usurp the district court's authority to manage discovery based only on speculation.

B. The government does not have a clear and indisputable right to mandamus relief

The government is required to show that its right to relief is "clear and indisputable." *Perry*, 558 U.S. at 190. It cannot do so, because it seeks to deviate from the normal rules of judicial review that were followed by the courts below.

1. Completion of the administrative record

a. The government contends (Pet. 18) that the district court clearly and indisputably erred in ordering it to produce the full administrative record underlying the decision to rescind DACA. That is wrong.

It is well established that review under the APA must be based on the "whole record," 5 U.S.C. § 706, meaning "the full administrative record that was before the [agency] at the time [it] made [its] decision," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). That includes "all materials that were directly or indirectly considered by agency decision-makers," including "evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *see Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). Providing that record will allow the reviewing court to evaluate whether the agency "relied on [impermissible] factors," "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Until recently, the government accepted that settled understanding: Longstanding U.S. Department

of Justice guidance (which the government rescinded the day it filed a mandamus petition in the court of appeals) said that the administrative record "consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision," including documents "not specifically considered" by the decisionmaker herself. *See* U.S. Dep't of Justice, ENRD, *Guidance to Federal Agencies on Compiling the Administrative Record* (Jan. 1999), available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf (last visited Dec. 13, 2017) (1999 DOJ Guidance).[4]

Although courts initially must presume that an agency's proffered record is complete, this presumption can be rebutted by "clear evidence to the contrary." *Bar MK*, 994 F.2d at 740. An agency "may not unilaterally determine what constitutes the administrative record" without any court review. *Id.* at 739. Such a rule would make judicial review toothless.

b. Here, respondents established a significant basis for the courts below to conclude that the administrative record produced by the government was incomplete.

First, as the court of appeals recognized, it is facially implausible that the government made a decision that affects the fate of 800,000 people and has been the subject of widespread national attention

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[4] The government (Pet. 25 n.5) argues that its guidance is not binding, but that misses the point, which is that the government, like everyone else, recognized these established principles of administrative law, and the government's (newfound) disagreement with that understanding does not justify mandamus.

based only on 14 publicly available documents. Pet. App. 6a–7a (it is "not credible" that "the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents"); *id.* at 16a (Watford, J., dissenting) (making the same point).

Second, the government's own representations demonstrated that the Acting Secretary considered more than 14 documents. The government identified (and claimed privilege on) 84 more documents. D.Ct. Dkt. 71-2. The government also acknowledged that the Acting Secretary considered other non-privileged documents, including communications about DACA with state attorneys general and "media articles." Pet. App. 36a.

Third, certain additional documents are obviously missing from the record. For example, the sole justification for the decision was litigation risk, *see* Pet. App. 66a—yet the government included only the letter received from the 10 States that opposed DACA, and not the one from the 20 States that support DACA (which provided legal analysis to support their view). D.Ct. Dkt. 64-1. The proffered record contained no "materials analyzing the [potential] lawsuit." Pet. App. 35a. Further, despite public pronouncements about the President's and Attorney General's roles in making this decision, the record contained no documents (public or otherwise) from the White House and only one (public) document from DOJ. Pet. App. 33a–34a.

Fourth, the government's change in position undercuts its assertion that only 14 documents informed

the decision to terminate DACA. In APA review, courts ordinarily require the government to "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted). Yet nothing in the proffered record explains the administration's about-face, from the President's and then-Secretary Kelly's promises to protect DACA recipients in spring of 2017 to the Acting Secretary's determination in September 2017 that DACA was "a lie." Pet. App. 34a–35a. There likewise was no discussion of "factors militating in favor and against this switch in policy." *Id.* at 35a. An explanation is particularly warranted because, after the Acting Secretary announced her decision, the President weighed in, suggesting—contrary to the prior announcement—that he would continue to protect the Dreamers. D.Ct. Dkt. 1 at 11 ("Congress now has 6 months to legalize DACA . . . If they can't, I will revisit this issue!").

Finally, the government fully admits that it is taking an exceedingly narrow view of the administrative record. It says that it need only include documents the Secretary "personally viewed" (Pet. App. 35a)—even though it previously acknowledged, in line with court of appeals precedent, that the record includes all material considered "directly or indirectly" by the decisionmaker. 1999 DOJ Guidance 1–2; *see also Thompson*, 885 F.2d at 555. Everyone knows that supervisors make decisions based on the work and recommendations of subordinates. That is true for large administrative agencies, especially when they are considering issues on which many parts of the Executive Branch have views. The material considered by

a decisionmaker's advisors necessarily informs the agency's decision and properly constitutes part of "the evidence on which it was based." *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citation omitted).

Accordingly, the district court appropriately directed the government to discharge its obligation under the APA to provide the complete administrative record.

c. The district court's application of bedrock principles of administrative agency review cannot constitute "clear and obvious" error. The court's direction to the government to compile the "whole record" is consistent with the APA, Supreme Court and circuit law interpreting it, and the government's own (prior) guidance.

The government's position essentially is that the Executive, and not the Judiciary, defines the record to be used for judicial review of administrative agency action. But the government provides no authority for that sweeping proposition, and settled law is to the contrary. *See Thompson*, 885 F.2d at 555; *Bar MK*, 994 F.2d at 739. This Court has been quite skeptical of similar assertions of unilateral agency authority. *See, e.g., Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652 (2015) ("Absent [judicial] review, the Commission's compliance with the law would rest in the Commission's hands alone."); *see also United States v. Stevens*, 559 U.S. 460, 480 (2010).

In the government's view (Pet. 24), so long as "the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end"—even when the agency's

proffered administrative record is "not credible," Pet. App. 7a., and the agency's decision "will profoundly disrupt the lives of hundreds of thousands of people," Pet. App. 16a (Watford, J., dissenting). But a court cannot effectively evaluate whether an agency's explanation for its decision "runs counter to the evidence before the agency," *State Farm*, 463 U.S. at 43, when the agency presents only a selective record, one that excludes "evidence contrary to the agency's position," *Thompson*, 885 F.2d at 555. Nor can the reviewing court evaluate whether the agency "has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. The only way for courts to ascertain whether an agency has relied on impermissible factors or disregarded evidence before it is to analyze all of the materials that were before the agency decisionmaker.

Moreover, the district court here did not "go beyond the agency record" by "'requir[ing] the administrative officials who participated in the decision to give testimony explaining their action,'" which would have required a "'showing of bad faith or improper behavior.'" Pet. 20 (quoting *Overton Park*, 401 U.S. at 420). Rather, the court found that "the full administrative record"—*i.e.*, what "was before the Secretary at the time he made his decision," *Overton Park*, 401 U.S. at 420—had never been presented in the first place. *See* Pet. App. 8a.[5] Similarly, the government's reliance (Pet. 20) on the principle that the reviewing

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[5] Respondents have argued that the government acted in bad faith in refusing to provide the whole administrative record, but that issue has not yet been resolved by the district court. *See, e.g.*, D.Ct. Dkt. 111 at 29.

court "appl[ies] the appropriate APA standard of review . . . based on the record the agency presents to the reviewing court," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985), does not aid the government; that decision recognized that a court must consider the complete and actual "record before the agency" at the time of its decision, *id.* at 744, not some partial record chosen by the government.

The government's citation (Pet. 17) to *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), also misses the mark. This case is not about discovery specifically targeted at the Vice President that "asks for everything under the sky," *id.* at 387; instead, respondents asked the government to fulfill its obligation under the APA to compile the materials used to make the decision to rescind DACA. As the court of appeals explained here, there is no reason to believe that "either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." *Id.*[6] The government seeks a change in the law to narrow the record on administrative review. But that is not what mandamus is for—mandamus is for remedying an error that is clear and indisputable under existing law.

At base, the government's position is the Executive Branch may control the record on review in APA cases, thereby circumscribing judicial review of its

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[6] The government also asserts (Pet. 20) that the decision to terminate DACA is "entirely unreviewable" under 8 U.S.C. § 1252(g). That is an open issue not yet considered by the courts below. *See* D.Ct. Dkt. 205 at 9–11. This Court should not reach out to decide it in the first instance.

own actions. That view strikes at the heart of separation of powers. Accepting the government's view would severely limit the Judiciary's critical role "in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Like other limits on Executive Branch action, administrative agency review "safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other." *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (internal quotation marks omitted). The government's position boils down to "trust us." But the government's contradictory statements and facially implausible record submission provides ample reason not to do so.

2. *In camera* review of documents for which the government claimed deliberative-process privilege

The government asserted deliberative-process privilege over 84 documents, and the district court reviewed them *in camera* and considered claims of privilege. Pet. App. 40a, 43a. The government now contends (Pet. 27, 31–32) that the court so egregiously erred in making those determinations that mandamus is warranted. Not so.

In response to the government's claim of privilege, the district court did what district courts do all the time. It followed the Court's guidance that "*in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr*, 426 U.S. at 405–06. And it went document-by-document to carefully evaluate claims of privilege. The court did so even though the government's privilege

log failed to properly substantiate its claims of privilege. *See Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (setting out requirements for claiming deliberative-process privilege). Contrary to the government's assertion (Pet. 17, 31), the court did not treat the government's deliberative materials in a wholesale, "sweeping," and "dismissive" manner.

In conducting its review, the district court applied the established deliberative-process balancing test, Pet. App. 40a, under which a "litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure," *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). After evaluating each of the 84 documents using that standard, the district court found 49 documents privileged in whole and two documents privileged in part. Pet. App. 40a, 43a. The district court relied on existing law, and its individual resolutions of deliberative-process claims using that law do not come close to clear and indisputable error.

Against this established authority, the government urges the Court to adopt a "categorical[]" privilege against disclosure of all "pre-decisional" documents, citing case law concerning inquiry into decisionmakers' "mental processes." Pet. i, 27, 30. The cases the government cites are inapposite; they concern attempts to obtain testimony from decisionmakers explaining their actions *after* a decision had been made or a complete record was created. *See Overton Park*, 401 U.S. at 420 (post-decision testimony of decisionmakers "explaining their action"); *United States*

v. Morgan, 313 U.S. 409, 422 (1941) (testimony of Secretary of Agriculture regarding process by which he "reached [his] conclusions"); *see also, e.g., Checkosky v. SEC*, 23 F.3d 452, 487–89 (D.C. Cir. 1994); *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983). Because such testimony did not exist when the agency made its decision, it necessarily could not be part of the administrative record. *See Florida Power*, 470 U.S. at 743 ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (citation omitted). Decisions placing limits on *post*-decision inquiries into the decisionmaker's mental processes do not justify a rule that all *pre*-decisional deliberative materials be excluded from the administrative record.

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 44–45 (D.C. Cir. 1986), addressed pre-decisional deliberations of the members of a multimember agency. But it is inapposite, because the record at issue—a transcript of a closed meeting of the agency—represented the "collective mental processes of the agency." *Id.* at 44. The government has made no showing that the 35 documents to be disclosed in this case meet that high bar—let alone that they clearly and indisputably do.[7]

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[7] Depositions of even high-ranking agency officials are appropriate in certain circumstances, such as where "the official has first-hand knowledge related to the claim being litigated." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). In light of this authority, the magistrate judge authorized a limited deposition of Acting Secretary Duke—a decision that the government has yet to challenge in the district court. *See* D.Ct. Dkt. 94 at 1; *see also* D.Ct. Dkt. 88 at 1-5 and n.3.

Under existing law, the deliberative-process privilege is a qualified one. The government now seeks to convert it to an absolute privilege—not with the benefit of lower court decisions, briefing, and argument, but on mandamus review, which is limited to correcting egregious and obvious errors. If, as the government suggests, the record must omit all pre-decisional "emails, letters, memoranda, notes, media items, opinions and other materials" considered by the Acting Secretary, the district court could not conduct effective APA review, *see* 5 U.S.C. § 706, and any reviewing court (including this Court) would be similarly hamstrung. For that reason, federal agencies routinely produce, and courts regularly review, these types of pre-decisional documents. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017). Until quite recently, the Department of Justice agreed, advising federal agencies to include these documents in their administrative records. *See* pp. 14–15, *supra*.

The government's sweeping attempt to shield all pre-decisional materials, if accepted, would seriously intrude on the role of the courts. *See United States v. Nixon*, 418 U.S. 683, 703–13 (1974) (categorical withholding of Executive Branch documents seriously impairs Judiciary's role). That is why the deliberative-process privilege is a qualified one. Courts appropriately assess whether the "need for accurate fact-finding override[s] the government's interest in non-disclosure," *Warner*, 742 F.2d at 1161, rather than treating the government's mere assertion of deliberative-process privilege as sufficient to withhold any deliberative document.

3. Evaluation of executive privilege and attorney-client privilege claims

The government's complaints (Pet. 31) about the district court's treatment of executive privilege and attorney-client privilege are unfounded.

a. The government contends (Pet. 31) that the district court "gravely erred by ordering disclosure of various White House documents." This argument concerns four documents where the court ordered inclusion in the record over the government's claim of executive privilege. Pet. App. 43a. They are documents that, to this point, only the government and the district court have seen. *See ibid.*

First, the government failed to present any specific argument about those documents to the court of appeals (or to the district court since its initial ruling). *See* Pet. App. 12a n.8. Instead, the government lumped all of the district court's rulings together. C.A. Dkt. 1-2 at 22–23. As a result, the court of appeals concluded that it did not have sufficient information to evaluate disclosures of specific documents. Pet. App. 12a n.8. But the court of appeals confirmed that the government *could* challenge specific disclosures in that court. If the government has arguments to make about particular documents, it should present those arguments to the courts below. The district court has already sustained a majority of the government's privilege claims under this procedure, and the government will have the same opportunity to make its case for privilege (both in the district court and court of appeals) moving forward.

Notably, the mandamus petition to this Court is the first time that the government ever suggested that

one of the 84 documents provided to the district court for *in camera* review was a "memorandum from the White House Counsel to the President." Pet. 31–32. In the courts below, the government described that document as a "Draft White House memorandum regarding litigation related to DACA," D.Ct. Dkt. 71-2 at 5, and the government's privilege log (all that respondents are allowed to see) indicated that the document was located in the Acting Secretary's files, not White House files, *ibid.* Apparently neither the author nor the recipient of the memorandum was obvious from the document itself, because the district court concluded, after *in camera* review, that it did not "fall within the executive privilege." Pet. App. 40a n.7. If the government has additional information to share about this document (or any other document for which it claims privilege), it should share it with the district court.

The district court's privilege determinations do not implicate the concerns this Court expressed in *Cheney*. The government claimed executive privilege as to seven of the 84 documents in the Acting Secretary's custody and the district court ordered that only four be included in the administrative record. *See* Pet. App. 43a; *see also* D.Ct. Dkt. 71-2. The government has not established that claiming privilege over these four documents imposes the sort of burdens at issue in *Cheney*, and so the courts below do not have the information required do the balancing analysis described in that case. The government should be required to substantiate its assertions of burden in the lower courts to allow reasoned analysis of the issue, rather than circumventing the process through mandamus in this Court.

b. The government attacks the district court's conclusion that it waived attorney-client privilege to the extent that it placed attorney-client communications "at issue" by using litigation risk as the sole justification to rescind DACA. Pet. App. 37a. But that ruling follows well-settled law that "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). The sole justification the Acting Secretary gave for rescinding DACA was "litigation risk"—the "sword" on which the government relies to terminate a program that has benefited 800,000 individuals. Yet the government has prevented any analysis of that "litigation risk" by withholding the relevant documents on attorney-client privilege grounds.

Under the circumstances of this case, the district court correctly found waiver of the attorney-client privilege. *See, e.g.*, *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 361 (2d Cir. 2005) (DOJ cannot make repeated public references to internal OLC legal analysis "when it serves the Department's ends but claim the attorney-client privilege when it does not"). And the court appropriately rejected the government's alternative argument—that "assessing [the] correctness [of the Acting Secretary's legal judgment] would not depend on the 'legal research' used to reach that conclusion." Pet. 32; *see also* Pet. App. 38a. As the district court explained, the government's litigation risk "would heavily turn on the underlying legal analysis so far withheld from view," and the "the reasonableness of the Secretary's legal rationale" also depends, in part, on "how consistent the analysis has been in the runup to the rescission." Pet. App. 38a.

The government identifies no sound basis to second-guess the results of the district court's *in camera* review of the claimed privileged documents, much less to conclude that the court committed error so extreme that it would justify mandamus. This Court ordinarily does not review interlocutory privilege decisions, including decisions involving the attorney-client privilege. *See Mohawk Indus.*, 558 U.S. at 108. Even in cases involving discovery into important matters of national security, this Court has trusted district courts to evaluate claims of privilege and courts of appeals to review those rulings. *See, e.g., Webster v. Doe*, 486 U.S. 592, 604 (1988) (explaining that district courts have considerable "latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). If that latitude to evaluate documents and balance competing concerns is available even in the most sensitive national-security cases, it should be available here as well, where the decision will indisputably harm hundreds of thousands of DACA recipients.

4. Discovery

The government argues (Pet. 18) that the district court clearly and indisputably erred in "authorizing broad discovery." That is not a fair characterization of the district court's rulings. The district court has not ordered the government to produce any documents in discovery. All it has done is enter an initial discovery order, which (at the government's request) limited the number of discovery requests respondents could make to the government. Pet. App. 21a–25a.

The court also asked the government to go ahead and respond to discovery requests "if they're reasonable," Stay Opp. Add. 22, in light of the expedited nature of the litigation, *id.* at 17–18, 40. And the court assured the government that if discovery "gets going too far sideways, I'll put a stop to it." *Id.* at 22.

Apparently unsatisfied with that modest approach, the government now seeks to prevent all discovery on respondents' non-APA claims. But there is nothing erroneous, let alone clearly and indisputably erroneous, about the district court allowing focused discovery to proceed under these circumstances. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam); *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.*, 662 F.3d 887, 891 (7th Cir. 2011). District courts have wide discretion to enter discovery and similar case-management orders, and the district court carefully and appropriately exercised that discretion here.

This Court should be loath to circumvent the district court's authority to manage discovery, especially at such an early point in the process. *See Mohawk Indus.*, 558 U.S. at 108–10. There is simply no reason for this Court to step in before the government has even objected to any discovery request or been required to produce any document.

C. Mandamus is not appropriate under the circumstances of this case

1. The government argues (Pet. 33) that mandamus is necessary to prevent "unwarranted intrusions" into "the highest levels of the Executive Branch." But the district court did not order such intrusions. When

the court required disclosure, it did so because it concluded that disclosure was *warranted* after evaluating the government's interests using the deliberative-process balancing test. Pet. App. 40a, 43a. If any Branch of government faces "unwarranted intrusions," it is the Judiciary, whose role will be severely circumscribed if the Executive gets its way in this case. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008); *Nixon*, 418 U.S. at 707, 712. The Judiciary can only carry out its "important" role in reviewing agency action under the APA, *Judulang*, 565 U.S. at 53, if it has "the full administrative record that was before the Secretary," *Overton Park*, 401 U.S. at 420.

2. Granting mandamus in this case would expand the writ well beyond its traditional understanding. This Court has "generally denied review of pretrial discovery orders." *Mohawk Indus.*, 558 U.S. at 108 (internal quotation marks omitted); *see Will*, 389 U.S. at 96. That is for good reason—for our judicial system to work, district courts must have discretion to manage their dockets and control the pace and flow of litigation, including the timing and number of discovery requests. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *see also Allied Chem.*, 449 U.S. at 36.

Further, mandamus "indisputably contributes to piecemeal litigation." *Allied Chem.*, 449 U.S. at 35; *see Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (cautioning against an interpretation where "every interlocutory order" could be reviewed using mandamus). And mandamus is a particularly heavy-handed way to correct a district court's trial-management decisions. It "has the unfortunate consequence of making a district court judge a litigant,"

Allied Chem., 449 U.S. at 35—an outcome that should be reserved for only the most egregious cases (not this one).

3. The balance of the equities weighs strongly against mandamus. If the Court denies mandamus, then the Executive's decision to end DACA will be subject to ordinary judicial review. The government will have to assert and litigate claims of privilege and wait to challenge discovery until the court actually enters an order requiring production. Those are not extraordinary burdens; they are how the legal system is supposed to work. Here, the government has already told the district court that it could complete the administrative record in three weeks, Stay Opp. Add. 74; the district court will use *in camera* review to assess any claims of privilege, Pet. App. 43a; and the court of appeals stands ready to review any adverse privilege rulings—as soon as the government provides argument about the specific documents ordered disclosed, Pet. App. 12a n.8. Under the circumstances, any harms facing the government are speculative at best.

If the Court grants mandamus, then 800,000 DACA recipients will never know the full basis for the government's decision to take away promised benefits and subject them to removal from the United States. And without knowing that basis, reviewing courts (including this Court) will be hamstrung in trying to evaluate respondents' challenges to the decision to end DACA. It is undisputed that government officials who decided to end DACA considered more than the scant administrative record the government initially submitted. *See* pp. 15–17, *supra*. Indeed, the govern-

ment admits that there are 6,000 additional documents that were used to make the decision. *See* Stay Appl. 14.

The government's statement that depriving respondents of the record used to rescind DACA imposes only "minimal burdens" (Pet. 33) is plainly untrue and coldly dismissive. The decision to end DACA already is causing catastrophic and irreparable harm to DACA recipients, as the threat of deportation is forcing them to make wrenching choices of whether to leave their schools, jobs, and even their U.S. citizen children and other family members. D.Ct. Dkt. 1 ¶¶ 13–14; D.Ct. Dkt. 111; Compl. ¶¶ 128–32. For the courts to resolve whether that decision was lawful, the administrative record and discovery must be complete.

II. The government's alternative request for a writ of certiorari should be denied

The government has not established an entitlement to a writ of certiorari, and certainly not certiorari with summary reversal. The petition raises strictly fact-based challenges to the district court's interlocutory rulings—not legal issues where the lower courts have disagreed or the court below issued a ruling contrary to a decision of this Court. *See* S. Ct. R. 10. Nor does the district court's application of ordinary principles of administrative law provide the type of exceptional circumstances that could justify this Court's review in the absence of such a conflict.

The government strains to manufacture a conflict in authority (Pet. 17), but none exists. The legal principles the lower courts applied to determine whether the government produced the "whole" administrative

record are consistent with this Court's decisions, including the four decisions on which the government primarily relies. *Florida Power* involved a different question—expanding an already complete administrative record with materials that were not considered by the agency. 470 U.S. at 744. Here, the district court ordered completion of a facially deficient record, not supplementation of a complete one. Pet. App. 2a n.1, 6a–7a. *Overton Park* supports respondents' view, not the government's: There, the Court recognized that review of agency action must "be based on the full administrative record that was before the Secretary at the time he made his decision." 401 U.S. at 420; *see also* Pet. App. 3a, 6a–8a. Because the district court's order involved completing the administrative record with pre-decisional documents rather than expanding it with decisionmakers' post-decision testimony "explaining their action," *Overton Park*'s "bad faith or improper behavior" standard does not apply. *See* 401 U.S. at 420.

There is similarly no conflict with *Morgan*, because the documents the district court ordered to be included in the record pre-date the decision to rescind DACA; they are not post-decision testimony "prob[ing] the mental processes" of the agency, 313 U.S. at 422, which necessarily would not be part of the administrative record. And *Cheney*, 542 U.S. at 383, 387, is not a "categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." Pet. App. 13a. *Cheney* concerned exceptionally burdensome discovery directed to the Vice President himself, whereas here the gov-

ernment faces limited discovery requests and a district court poised to protect its privileged documents. Pet. App. 22a, 43a.

And there is no circuit conflict warranting review. As the court of appeals explained (Pet. App. 14a–15a), the D.C. Circuit's *San Luis Obispo* decision is inapposite here, because it involved "transcripts of literal deliberations among members of a multi-member agency board," Pet. App. 14a, which were analogous to disclosure of the "collective mental processes" of an individual decisionmaker in a deposition, 789 F.2d at 44. The district court did not order disclosure of any similar material here. *See* p. 23, *supra*.

Finally, the district court's case-management decisions do not "depart[] from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). To the contrary: To compile the administrative record, the court applied circuit precedent, which is wholly consistent with this Court's guidance. It (and the court of appeals) concluded, based on a number of factors, *see* pp. 7–9, *supra*, that the government's proffered record could not plausibly represent the "whole record" considered by the agency decisionmaker. Pet. App. 6a–8a, 35a. The courts below respected claims of privilege, and the court of appeals specifically invited the government to appeal particular privilege rulings with which it disagreed. Rather than follow the normal judicial-review process, the government leapfrogged to this Court, asking for the Court not only to undo the district court's careful work, but also to go ahead and usurp the district court's authority to manage discovery.

It is the government—not the district court—that has shown an "extraordinary disregard for settled principles of judicial review" (Pet 17). The President promised protection to the 800,000 Dreamers, and then the administration reneged on that promise. At the very least, the hundreds of thousands of people affected by the government's about-face should be afforded a fair opportunity to test the legality of that decision.

CONCLUSION

The petition for a writ of mandamus or certiorari should be denied.

Respectfully submitted.

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No. 17-801

IN THE
Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, IN OPPOSITION

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QUESTION PRESENTED

Whether the government has satisfied the requirements for the drastic and extraordinary remedy of a writ of mandamus ordering the district court to halt completion of the administrative record and discovery where: (i) the administrative record filed by the government consists of just 14 previously-published documents totaling 256 pages (including 192 pages of judicial opinions); (ii) the government does not challenge the lower courts' determination that it is not credible that the government decided to terminate a program providing legal protection to approximately 800,000 individuals based solely on these documents; (iii) the government's arguments that courts lack authority to order agencies to complete the administrative record, and that agencies have unreviewable authority to exclude from the administrative record documents they deem to be privileged or irrelevant to the agency's stated ground of decision, are contrary to multiple legal authorities and, at a minimum, not "clearly and indisputably" correct; (iv) the government did not properly present (or, in many instances, present at all) its objections in the courts below; and (v) the government retains other means to obtain relief.

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STATEMENT

1. Since 1956, every presidential administration has exercised its authority to set "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), by adopting deferred action programs protecting certain categories of otherwise removable immigrants from deportation. *See* AR 15; D.Ct. Dkt. 111-1 (summarizing 17 pre-DACA deferred action programs).[1] These programs recognize that the federal government lacks resources to "enforce all of the [immigration] rules and regulations presently on the books," and that "[i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." D.Ct. Dkt. 121-1 at 2. The legality of these programs was widely accepted, and none was challenged in court.

In 2012, the Secretary of Homeland Security issued a memorandum establishing the Deferred Action for Childhood Arrivals (DACA) program. Pet. App. 47a. DACA applies to "certain young people who were brought to this country as children and know only this country as home." *Id.* at 47a-48a. Eligibility is limited to individuals who (1) came to the United States under the age of sixteen; (2) continuously resided in the United States since June 15, 2007, and were present in the United States on June 15, 2012 and on the date they requested DACA; (3) are in

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[1] "AR" refers to the administrative record filed by the government in the district court in No. 17-cv-5211. "D.Ct. Dkt." refers to documents filed in the district court.

school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) have clean criminal records and are not a threat to national security or public safety; (5) were under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. Pet. App. 48a. To apply for DACA, eligible individuals were required to provide the government with sensitive personal information, including their home address and fingerprints, submit to a rigorous background check, and pay a substantial fee. D.Ct. Dkt. 121-1 at 169-70, 172. Applicants were then evaluated on a case-by-case basis. *See* AR 2.

Nearly 800,000 young people have applied for and received deferred action under DACA. D.Ct. Dkt. 1 at 8. DACA confers life-changing benefits on its recipients. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058-59 (9th Cir. 2014). During the period of deferred action, they are not subject to deportation, nor do they accrue time for "unlawful presence" for purposes of the bars on re-entry under the Immigration and Nationality Act. *See* 8 U.S.C. § 1182(a)(9)(B)-(C). They may obtain social security numbers and employment authorization. *See* 8 C.F.R. § 274a.12(c)(14); D.Ct. Dkt. 121-1 at 167-70. Other benefits flow from these documents, such as driver's licenses, medical insurance, and tuition benefits, as well as access to bank accounts, credit, and the ability to purchase homes and vehicles. *See* D.Ct. Dkt. 111 at 8. DACA recipients also obtain favorable consideration for advance parole, allowing them to travel abroad and then return without being detained. D.Ct. Dkt. 124-2 at 2. *See* 8 C.F.R. § 212.5(f); D.Ct. Dkt. 121-1 at 183-84.

2. Until September 2017, the government consistently defended the legality of DACA. In a 2014 opinion, the Office of Legal Counsel memorialized its pre-promulgation advice "that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." AR 21 n.8. In court, the government argued that DACA is "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." Br. of United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. No. 15-15307), 2015 WL 5120846 at *1. No court has ever held DACA unlawful. In February 2017, then-Secretary of Homeland Security John Kelly issued a memorandum establishing new enforcement priorities and rescinding prior enforcement policies. AR 230. But DACA was explicitly carved out from the scope of that rescission. *Id.*

In June 2017, officials from the Department of Justice (DOJ), including Attorney General Sessions, and the Department of Homeland Security (DHS) began communicating with several state attorneys general who previously had challenged another deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—which, unlike DACA, was never implemented and had not fostered any reliance interests. D.Ct. Dkt. 124 at 80-82. Those discussions culminated in a June 29, 2017 letter from nine state attorneys general to Attorney General Sessions, demanding "that the Secretary of Homeland Security rescind" and "phase out the DACA program," and

threatening to bring suit if that did not occur by September 5. AR 239.

On September 4, 2017, Attorney General Sessions sent a one-page letter to the Acting Secretary of DHS, Elaine Duke. *See* AR 251. The letter advised that DHS "should rescind" DACA because it was "effectuated ... without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." *Ibid.* It stated summarily that DACA "has the same legal and constitutional defects that ... courts recognized as to" the DAPA program, which had been preliminarily enjoined in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). *Ibid.* Although *Texas* did not address the legality of the DACA program, which is factually and legally distinct from DAPA—and although no court has ever found any "constitutional defect[]" in DAPA—the letter asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*

The next day, Attorney General Sessions held a press conference and announced that DACA "is being rescinded." D.Ct. Dkt. 1-3 at 2. He reiterated the conclusions in his letter and made additional claims in support of rescission: that DACA "contributed to a surge of unaccompanied minors on the southern border"; "denied jobs to hundreds of thousands of Americans by allowing [them] to go to illegal aliens"; was an example of a failure to enforce the immigration laws that "has put our nation at risk of crime, violence, and even terrorism"; and that rescission of DACA would "make us safer and more secure" and

"further economically the lives of millions who are struggling." *Id.* at 2-3.

Later that day, Acting Secretary Duke issued a memorandum formally rescinding DACA. Pet. App. 61a-69a. She provided a two-sentence explanation:

> Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities ... I hereby rescind the June 15, 2012 memorandum.

Id. at 67a. The rescission memorandum instructed DHS to immediately stop accepting DACA applications or approving new applications for advance parole; to accept renewal applications only from individuals whose current deferred action would expire on or before March 5, 2018, and to accept such renewals only through October 5, 2017; and to allow DACA grants to expire beginning March 5, 2018. *Id.* at 67a-68a. Despite the Attorney General's statement that DACA is illegal, President Trump announced that "Congress now has 6 months to legalize DACA ... If they can't, I will revisit this issue!" D.Ct. Dkt. 1 at 11.

3. Respondents have filed five related complaints in the District Court for the Northern District of California. Respondents University of California and

President Napolitano assert claims under the Administrative Procedure Act (APA), alleging that the decision to terminate DACA was arbitrary and capricious because the asserted rationale was pretextual and the government reversed a prior policy without addressing the consequences of its decision for DACA recipients and their families or their substantial reliance interests. Respondents also allege that the government failed to follow the notice-and-comment requirements of the APA and that the rescission violates the procedural due process requirement of the Fifth Amendment. *See* D.Ct. Dkt. 1 at 14-16. (The other four suits assert additional statutory and constitutional claims.)

4. The district court held a case management conference on September 21, 2017. Recognizing that tens of thousands of young people will begin to lose their DACA benefits beginning on March 5, 2018, the district court noted that "we need to come up with a plan to manage the cases so that we get the decisions that you need and also that they are done with such a record that the Court of Appeal can [review before] March 5th." C.A. Dkt. 13 at 59:8-11 (Tr. of Proceedings, 9/21/17).[2] The parties agreed that it was necessary for the government to produce the administrative record swiftly. *See id.* at 68-69. The court emphasized that it would be inappropriate for the government to "put[] in [the administrative record] what helps them and ... leave out what hurts them." *Ibid.* It noted that if there are documents such as "memos" or "e-mails" that are part of the record

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[2] "C.A. Dkt." refers to documents filed in the court of appeals in No. 17-72917.

before the agency, those documents must "be in the administrative record," even if they "hurt[] your case." *Ibid.*

On October 6, the government filed an administrative record consisting of fourteen documents totaling 256 pages. Pet. App. 5a; *see* D.Ct. Dkt. 64. The fourteen documents consist entirely of materials that were already publicly available, including 192 pages of court decisions. On October 9, plaintiffs moved for an order directing the government to complete the administrative record and to produce a privilege log, and sought rulings on certain related issues. *See* D.Ct. Dkt. 65. Following briefing and argument, the district court granted plaintiffs' motion in part and denied it in part. *See* Pet. App. 26a-44a.

The district court found that plaintiffs had established "by clear evidence[] that the agency relied on materials not already included in the record." *Id.* at 30a. Specifically, the court found that the proffered record did not contain "a single document from one of [Acting] Secretary Duke's subordinates" or advisers from other parts of the federal government; "any materials analyzing the [threatened] lawsuit or other factors militating in favor of and against the switch in policy"; any documents regarding the agency's decision in February 2017 to retain DACA; or the news articles regarding DACA that the government conceded the Acting Secretary had reviewed and were physically present in her office. *Id.* at 34a, 35a; *see id.* at 31a-37a.

Having made factual findings that the proffered record was incomplete, the district court—applying

circuit precedent—ordered the government to file a record containing all documents "directly or indirectly considered in the final agency decision to rescind DACA." *Id.* at 42a-43a; *see also Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The district court's order identified several categories of documents that must be added to the record, tracking the Department of Justice's longstanding guidance to federal agencies regarding the proper contents of the administrative record. *See* Pet. App. at 32a.

The district court expressly noted that privileged documents need not be included. *Id.* at 43a. Rather, the court ordered that the government should assert privileges in an itemized privilege log. *See id.* at 40a-42a. With respect to 84 documents that the government had already submitted for *in camera* review at the court's direction, the court sustained the government's privilege assertions with respect to 49 documents and overruled them with respect to 35. *See id.* at 43a; *see also* D.Ct. Dkt. 71-2 (privilege log).

Finally, the district court addressed whether the government had waived the attorney-client privilege with respect to certain documents bearing on the legality of DACA. *See* Pet. App. 37a-39a. The court noted that the government's primary argument was "that DHS had to rescind DACA because it exceeded the lawful authority of the agency," and their "backup argument [was] that the agency's legal worry was 'reasonable' even if wrong." *Id.* at 37a-38a. Yet the proffered administrative record excluded all "legal analysis available to the Acting Secretary and to the Attorney General" other than the one-page "September 4 legal opinion of the Attorney General."

Id. at 38a. Applying the well-settled principle that a party cannot shield inquiry into legal advice it is using as a sword in litigation, the court held that the government had "waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." *Id.* at 39a.

5. On October 20, the government filed a petition for a writ of mandamus and an emergency motion for a stay in the court of appeals. C.A. Dkt. 1. The court of appeals granted a temporary stay, limited to discovery and record supplementation, but thereafter denied the mandamus petition. Pet. App. 15a.

The court of appeals held that the government had "not met the high bar required for mandamus relief" because "the district court did not clearly err by ordering the completion of the administrative record." *Id.* at 3a. Rather, the district court's order was "a reasonable approach to managing the conduct and exigencies of this important litigation—exigencies which were dictated by the government's March 5, 2018 termination date for DACA." *Id.* at 15a.

The court noted that the APA requires arbitrary and capricious review to "be based upon 'the whole record or those parts of it cited by a party.'" *Id.* at 4a-5a (quoting 5 U.S.C. § 706). The "whole record 'includes everything that was before the agency pertaining to the merits of its decision.'" *Id.* at 5a (quoting *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)). Having identified the governing standard, the court found that there had been a clear demonstration that

the administrative record was incomplete. *Id.* at 6a. "Put bluntly, the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." *Id.* at 6a-7a.

The court acknowledged the government's contention "that because the Acting Secretary's stated justification for her decision was litigation risk, materials unrelated to litigation risk need not be included in the administrative record," but explained that "this is not what the law dictates." *Id.* at 8a. Rather, the "administrative record consists of all materials '*considered by* agency decision-makers,' not just those which support or form the basis of the agency's ultimate decision." *Ibid.* (quoting *Thompson*, 885 F.2d at 555 and citing *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)) (internal citations omitted). Moreover, "even if the record were properly limited to materials relating to litigation risk, the district court did not clearly err in concluding that it is implausible that the Acting Secretary would make a litigation-risk decision" without considering documents beyond those in the proffered record, including materials concerning the "factors militating in favor of and against the switch in policy." *Ibid.* (internal quotation marks omitted).

Finally, the court of appeals addressed the government's privilege concerns. Although the court was "[m]indful of the separation-of-powers concerns raised by the government," it disagreed with their contention "that *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), bars the completion of the administrative

record with any White House materials." *Id.* at 3a, 12a. The court explained that *Cheney* involved "overbroad" civil discovery requests—not "an administrative agency's obligation under the APA to provide the court with the record underlying its decision-making"—and did not "impos[e] a categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 12a-13a. The court of appeals found that the government had failed to properly challenge the district court's privilege rulings in the district court and had "provided little in the way of argument regarding the specific documents." *Id.* at 12a n.8.

6. Shortly after the court of appeals denied mandamus, the district court set a revised deadline of December 22 for the government to complete the administrative record. *Id.* at 45a.

Following additional filings in the district court and the court of appeals concerning a stay, the government sought mandamus from this Court. On December 8, the Court granted a stay pending disposition of the government's mandamus petition.

REASONS FOR DENYING THE PETITION

I. The Government Has Not Satisfied the Stringent Requirements for a Writ of Mandamus

Mandamus is a "drastic and extraordinary" remedy that is reserved for "really extraordinary cases." *Cheney*, 542 U.S. at 380. Issuance of an

extraordinary writ "is not a matter of right, but of discretion sparingly exercised," and such writs are "rarely granted." S. Ct. R. 20. Indeed, over a recent eight-year period in which the Court received hundreds of petitions for writs of mandamus and other extraordinary writs each year, it did not grant a single one. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* § 11.1 at 661 n.9 (10th ed. 2013).

To qualify for a writ of mandamus, the government must demonstrate that (a) it has a "clear and indisputable" right to relief, (b) it has "no other adequate means to attain the relief [it] desires," and (c) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). These are exceptionally demanding requirements. The government has not met them here.

A. The Government Has Not Shown a "Clear and Indisputable" Right to Relief

1. *Providing the "Whole" Administrative Record to the Courts.* When a court reviews agency action under the APA, Congress has directed that "the court shall review the whole record." 5 U.S.C. § 706. As this Court has explained, the "whole record" consists of "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Courts of appeals have held that the administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555; *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)

("An agency may not unilaterally determine what constitutes the Administrative Record ...."). [3] Similarly, longstanding U.S. Department of Justice guidance (withdrawn on the same day the government filed its mandamus petition in the court of appeals) stated that the record "consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision," "is not limited to documents and materials relevant only to the merits of the agency's decision," and includes documents "not specifically considered" by the decisionmaker. *See* U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999), at 1-2, http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf ("Guidance to Federal Agencies"). [4]

In addition, Federal Rule of Appellate Procedure 16(a) provides that "the record on review or

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[3] *See also In re United States*, No. 15-3751, 2016 WL 5845712, at *1-2 (6th Cir. Oct. 4, 2016) (per curiam) (record includes all materials "either directly or indirectly considered"); *Bimini Superfast Operations LLC v. Winkowski*, 994 F. Supp. 2d 103, 105 (D.D.C. 2014) (documents properly included in administrative record "even if the agency considered it only indirectly"); *Pension Benefit Guar. Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 341 (S.D.N.Y. 1988); *Exxon Corp. v. U.S. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981); *Tenneco Oil Co. v. U.S. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

[4] Similar guidance documents remain in effect. *See, e.g.*, Memorandum from Pete Raynor, Assistant Solicitor, Fish, Wildlife, and Envtl. Prot. Branch, U.S. Dep't of the Interior to Dir., U.S. Fish and Wildlife Serv. (Jan. 7, 2000), http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf (incorporating 1999 Department of Justice guidance).

enforcement of an agency order" includes "any findings or report on which it is based" as well as "the pleadings, evidence, and other parts of the proceedings before the agency." Rule 16 expressly provides that courts may direct the government to complete or supplement the record. *See* Fed. R. App. P. 16(b) ("The parties may at any time, by stipulation, supply any omission from the record ... or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed."). Rule 16(b) "gives courts of appeals wide latitude in correcting omissions from the agency record under review." *Consumers Union of U.S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 661 (D.C. Cir. 1974) (per curiam); *see also Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1248 (11th Cir.) (courts have "discretion to correct the administrative record"), *modified on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006).[5]

The government does not dispute that it is required to make "the whole record" available to the court for judicial review. Nor does it dispute that the administrative record it submitted in this case consists of only 14 documents, comprising a total of 256 pages (including 192 pages of court opinions), all of which were already in the public record. Pet. App.

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[5] Although this case originated in district court, "reviews of agency action in the district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1251 n.2 (10th Cir. 2009) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994)).

5a-6a. Nor does the government challenge the lower courts' determination that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." *Id.* at 6a-7a. Indeed, the government has acknowledged that the administrative record submitted excludes non-privileged documents considered by the Acting Secretary. *See id.* at 36a ("[P]rivilege log entries reveal several documents that were considered in arriving at the decision to rescind DACA. For example, at least seven entries refer to commentary in media articles regarding DACA. At oral argument, government counsel admitted that the Acting Secretary had seen several media items on the issue.").

Despite all this, the government seeks an extraordinary writ of mandamus to "halt all expansion of the administrative record." Pet. 34. In effect, the government argues that when a court reviews administrative action under the APA, the administrative record consists of whatever the agency chooses to make available to the court. The government cites no authority for this extreme position, and certainly has not shown that it is "clearly and indisputably" correct. To the contrary, courts of appeals regularly require the government to complete administrative records that were found to be deficient. *See, e.g.*, *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) ("defendants' assurances that they have submitted the full record will not substitute for the Court's independent consideration of that issue after some opportunity for discovery"); *Boston Redev. Auth.*

v. Nat'l Park Serv., 838 F.3d 42, 48 (1st Cir. 2016); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984).

The government's proposed approach poses a serious threat to the courts' ability to review the legality of agency action. When a court reviews agency action under the arbitrary and capricious standard of the APA, it must determine, among other things, whether the agency overlooked relevant factors, considered irrelevant factors, or made a decision that runs "counter to the evidence before [it]." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In *Overton Park*, for example, this Court remanded the case because the record was not adequate to permit a "searching and careful" review of "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416. If agencies are free to exclude parts of the record that do not support their decisions, courts will be unable to conduct the searching review the APA requires.

Decisions such as *State Farm* and *Overton Park* contradict the government's assertion (made without supporting citation) that "[i]f the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end." Pet. 24. Such an approach would permit agencies to cherry-pick the materials they present to the courts, suppressing materials that cast doubt on agency decisions. This Court has weighed in against such an approach. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-89 (1951) (in determining

whether an agency's decision is supported by substantial evidence, courts must consider evidence before the agency that undermines the agency's decision because that "is clearly the significance of the requirement ... that courts consider the whole record").

The government's approach would also permit agencies to provide incomplete or pretextual reasons for their actions and then limit the administrative record to documents supporting the stated reason while suppressing documents relevant to other factors that contributed to the agency's decision. Indeed, there is evidence that this is what happened in this case. *See* D.Ct. Dkt. 111 at 29-31. While the government insists that the decision to terminate DACA was based on litigation risk, the Attorney General in announcing the decision asserted that rescission would reverse the loss of hundreds of thousands of jobs to illegal aliens and reduce crime, violence, and terrorism. D.Ct. Dkt. 1-3 at 2-3. None of these assertions—or the wealth of contrary evidence on the benefits of DACA to our society, economy, and the safety of our communities, *see, e.g.*, D.Ct. Dkt. 111 at 14, 18—are mentioned in the Acting Secretary's decision or reflected in the administrative record.

The government cites this Court's statements that "[t]he APA specifically contemplates judicial review on the basis of the *agency* record," and that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (emphasis added); *see also Camp v. Pitts*, 411 U.S. 138, 142

(1973) (per curiam). But these statements, read in context, mean only that a court reviewing agency action rarely should create a *new* record that includes materials that were not before the agency when it made its decision. In *FP&L* and *Camp*, there was no dispute that the record was complete; the dispute was over whether the parties could add to the record that was before the agency. These cases do not support—let alone "clearly and indisputably" require—the conclusion that courts must accept whatever administrative record the agency chooses to make available.

The government also cites this Court's cases holding that courts rarely should inquire into the "mental processes" of administrative decisionmakers. *United States v. Morgan*, 313 U.S. 409, 422 (1941). But inquiring into subjective mental processes is quite different from examining the materials that were before the agency decisionmaker in order to determine whether the agency's decision was arbitrary and capricious. The latter determination is an objective inquiry that does not depend on the decisionmaker's internal mental processes. *See In Re United States*, No. 17A570 (17-801), 2017 WL 5972687, at *4-*5, 583 U.S. ____ (2017) (Breyer, J., dissenting). Accordingly, the government's reliance on these cases is misplaced. Moreover, *Morgan* and the D.C. Circuit cases cited by the government involved on-the-record adjudicatory proceedings, where the decisionmaker plays a quasi-judicial role. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). The same considerations are not present where the agency engages in informal rulemaking that does not produce a trial-type record. Similarly, the decision in *San Luis Obispo Mothers for*

Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D.C. Cir. 1986), on which the government also relies, concerned a transcript of deliberations by a multi-member agency, which the court of appeals analogized to the mental processes of a single decisionmaker. Like the *Morgan* decisions themselves, this case casts no doubt on the requirement that the agency provide a complete administrative record so that the court can conduct arbitrary-and-capricious review.

The government makes the surprising claim that "[n]o factual or evidentiary record is required" at all in this case, because the Acting Secretary was making a "policy and legal judgment." Pet. 21. But an agency's "policy" and "legal" judgments may be arbitrary and capricious if they are based on consideration of the wrong factors, rest on legal errors, or are inconsistent with the relevant information before the agency. *See, e.g.*, *State Farm*, 463 U.S. at 52.

Lastly, the government argues that it should not have to complete the administrative record because it believes the Acting Secretary's decision is not subject to any judicial review, Pet. 21. But the district court has not yet ruled on the government's threshold defenses, and identical arguments have been rejected in the New York DACA litigation. *See Batalla Vidal v. Duke*, Nos. 16-4756, 16-5228, 2017 WL 5201116 (E.D.N.Y. Nov. 9, 2017). It would be extraordinary for this Court to decide these issues in the first instance. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court ... is one of final review, not of first view.") (quotation marks omitted). Such a course would be particularly extraordinary in this case,

because the government made a strategic litigation decision *not* to file a motion to dismiss at the outset of the case, despite an invitation from the district court to do so. *See* C.A. Dkt. 13 at 73-75. In any event, the threshold issues the government seeks to raise—whether the rescission was "agency action ... committed to agency discretion by law," 5 U.S.C. § 701(a)(2), or whether judicial review is precluded by the narrow jurisdiction-stripping provision of the INA, 8 U.S.C. § 1252(g)—have now been fully briefed and are scheduled for hearing before the district court on December 20.

At a minimum, the government's assertion that it cannot be required to add any additional materials to the administrative record is not "clearly and indisputably" correct. Accordingly, the government has not established a right to mandamus relief.[6]

2. *Asserting Deliberative Process Privilege.* The government appears to assert that the Executive Branch has unreviewable discretion to determine

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[6] The government acknowledges that if the administrative record compiled by the agency is inadequate, "the agency's decision is vacated and the matter is remanded to the agency for it either to change its decision or to compile a record that will support it." Pet. 24. In this case, both courts below have determined that the administrative record *is* inadequate. Thus, the government's own analysis would likely lead to a decision vacating the Acting Secretary's decision unless and until the agency "compile[s] a record that will support it." *Ibid.* This is grossly inefficient and would allow agencies to put forward the narrowest possible record, and if found insufficient, start over (perhaps multiple times).

whether documents are subject to a claim of deliberative process privilege, and to withhold those documents from the record without any opportunity for the courts to evaluate whether they are in fact privileged, or whether the qualified privilege is overcome in the circumstances. *See* Pet. 29-30. It cites no authority for this extreme position, and ignores numerous cases reaching the opposite result.[7] In addition, the government disregards this Court's longstanding recognition that "in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr* 426 U.S. at 405-06. It also ignores the government's own (recently rescinded) guidance explaining that "the administrative record includes privileged documents and materials," and that "the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they

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[7] *See, e.g.*, *Desert Survivors v. U.S. Dep't of Interior*, 231 F. Supp. 3d 368, 386 (N.D. Cal. 2017); *Mickelson Farms, LLC v. Animal & Plant Health Inspection Serv.*, No. 15-0143, 2017 WL 2172436, at *4 (D. Idaho May 17, 2017); *W&T Offshore, Inc. v. Jewell*, No. 14-2449, 2016 WL 8260549, at *2 n.5 (W.D. La. Feb. 23, 2016); *Wyoming v. U.S. Dep't of Interior*, Nos. 07-0319 & 08-0004, 2008 WL 11335191, *2 (D. Wyo. Oct. 6, 2008); *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 202 (D.D.C. 1986). Some district courts have held that privilege logs for deliberative materials need not be compiled as a matter of course in APA cases. These courts agree, however, that privilege logs must be provided where—as here—plaintiffs have "rebutted the presumption of regularity" regarding the composition of the administrative record. *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 33 (D.D.C. 2013); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 800 (E.D. Va. 2008).

are being withheld." Guidance to Federal Agencies, *supra*, at 4.

As to specific documents that the district court has reviewed *in camera*, the government does not argue that the district court applied the wrong legal standard, and it has not established that any of the district court's rulings on specific documents is clearly and indisputably incorrect. As for documents on which the district court has not yet made a privilege ruling, mandamus relief is clearly premature. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111-12 (2009) (mandamus may be appropriate in "extraordinary circumstances" to challenge actual "privilege rulings" and "disclosure order[s]" not *potential* rulings or orders); *see also McDaniel v. U.S. Dist. Court for D. Nev.*, 127 F.3d 886, 887 n.3 (9th Cir. 1997) (per curiam) (denying mandamus petitions as premature before the district court made a final ruling on discovery orders); *see also In re Prall*, 487 F. App'x 47 (3d Cir. 2012) (same); *infra* Pt. II (mandamus may issue only if all other avenues of relief have been exhausted).

Mandamus is inappropriate for the additional reason that the government has not properly asserted its privilege claims in the district court. Ordinarily, a government privilege—such as deliberative process or executive privilege—"must be formally asserted and delineated in order to be raised properly." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). A proper privilege assertion must include "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion

of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation [of] why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).[8] The government has not satisfied these requirements, even though six weeks have elapsed since the district court issued its rulings and nine days remain before the government will be required to make public any assertedly privileged documents. Nothing prevents the government from seeking reconsideration of the district court's order as to specific documents that the court reviewed *in camera* and supporting this request with a properly asserted claim of privilege (as well as information presented to this Court for the first time). Because the government has not exhausted these avenues, mandamus is inappropriate.

3. *Protecting Other Privileges.* The government also contends that the district court has forced it to disclose documents protected by executive privilege and other privileges. Pet. 31-32. Here too, the government has failed to establish that the district court clearly and indisputably erred.

When the government files its completed administrative record on December 22, 2017, it may withhold documents it believes are protected by any applicable privilege and substantiate its reasons for

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[8] In some circumstances, it is sufficient for the claim of privilege to be made by "supervisory personnel ... of sufficient rank to achieve the necessary deliberativeness in [the] assertion." *Landry*, 204 F.3d at 1136.

doing so. Pet. App. 43a. The district court will then "review and rule on each item." *Ibid.* If the government objects to the district court's rulings, it can present its objections to the court of appeals if necessary.

Nor is mandamus review appropriate for the 35 documents the district court has reviewed *in camera* and ordered included in the administrative record. Evidentiary rulings on the application of privilege are the daily bread-and-butter work of the district courts. Moreover, the government did not present an adequate challenge to any of the district court's specific privilege rulings in its mandamus petition to the court of appeals, and also failed to provide important information even to the district court. *See id.* at 12a n.8 ("The government ... has provided little in the way of argument regarding the specific documents ordered disclosed by the district court.").

Before this Court, the government focuses on one of the documents the district court reviewed *in camera*, asserting that it is a "*memorandum from the White House Counsel to the President*," which the government maintains is plainly subject to executive privilege. Pet. 31-32 (emphasis in Petition). The government did not provide this description of the document to the district court or the court of appeals; it was provided for the first time to this Court. App. Add. 26; *see also* Pet. App. 13a (observing that "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record"). Indeed, it is unclear if the district court, which reviewed the document *in camera*, could discern from the face of the

document that it was a memorandum from the White House Counsel to the President. The privilege log states only that the memorandum is a "Draft White House memorandum regarding litigation related to DACA." D.Ct. Dkt. 71-2 at 2. This Court should not grant mandamus based on information that the government could have, but did not, provide to the lower courts.

Furthermore, the fact that a document originates in the White House does not, without more, render it privileged or exempt it from inclusion in the administrative record. *See, e.g., Portland Audubon*, 984 F.2d at 1548-49 (ordering ex parte communications from White House added to the record); *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 26 (D.D.C.), *vacated in part on reconsideration on other grounds*, 2013 WL 11241368 (D.D.C. July 30, 2013) (rejecting the government's argument "that all communications with the White House in connection with interagency reviews are excluded from the administrative record"). The memorandum the government now emphasizes was located in the files of DHS, not the White House, and it was specifically considered by the Acting Secretary herself in determining whether to rescind DACA. D.Ct. Dkt. 71-2. The APA requires courts to review agency action on the basis of "the whole record" that was before the agency decisionmaker, 5 U.S.C. § 706, regardless of where in the government the record materials originated. *See Overton Park*, 401 U.S. at 420 ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

B. The Government Has Not Shown That It Has No Other Adequate Means to Obtain Relief

1. Mandamus is inappropriate unless the party seeking relief establishes that "no other adequate means [exist] to attain the relief he desires." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curium) (alteration in original) (quoting *Cheney*, 542 U.S. at 380). Accordingly, the writ may issue only if the party seeking relief "has exhausted all other avenues of relief." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *see also Cheney*, 542 U.S. at 379 ("mandamus may not issue so long as alternative avenues of relief remain available"). Here, the government has not exhausted all other avenues of relief.

In its petition, the government specifies four purported harms for which it claims to have no adequate remedy absent mandamus relief: (i) it "will [be] required to collect, review, and assert privilege as to thousands of additional documents"; (ii) "numerous deliberative materials will [be] made public"; (iii) "various privileges, including executive privilege, will [be] breached"; and (iv) "high-ranking government officials will [be] deposed" in connection with plaintiffs' non-APA claims. Pet. 18. For each claimed harm, the government has available avenues for relief short of mandamus.

As to depositions, the only deposition-related issue decided by any court to date is an order by the magistrate judge permitting a deposition of the Acting Secretary. The government has not appealed that decision to the district court, and neither the district

court nor the court of appeals has ruled on this issue.[9] Although the government complains that six depositions of mid-level officials have taken place, it never moved for a protective order to prevent those depositions. And, of course, the government retains the opportunity to ask the lower courts to regulate the number of depositions.

Similarly, the government can renew its privilege arguments for any of the documents already reviewed *in camera* after making a proper assertion of privilege. The same is true for documents not yet subjected to *in camera* review. To the extent the government is concerned about public disclosure of deliberative materials, it can file a motion to seal parts of the administrative record. *See MacKay v. DEA*, 664 F.3d 808, 811 n.5 (10th Cir. 2011) (sealing administrative record in APA case). Should the district court issue an adverse ruling on such a motion, the government can seek relief from the court of appeals.

The government's contention that the burden of complying with the district court's orders entitles it to mandamus relief is unpersuasive. The government relies on declarations that were never presented to either court below. *See* App. Add. 18-38. If the government believes these declarations justify a modification of the district court's orders, it can present them to the district court and seek a

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[9] The district court expressed a tentative view that such a deposition would be appropriate, Pet. 12, but that does not relieve the government of its obligation to make a formal objection to the district court, and then the court of appeals, if necessary, before seeking mandamus from this Court.

modification. Moreover, as explained below, *see infra* 30-31, the government's declarations do not show that the district court has imposed an excessive burden.

2. The government has failed to show that the district court's rulings are effectively unreviewable on appeal. The district court's rulings regarding the contents of the administrative record readily can be reviewed on direct appeal. If a reviewing court finds that the district court erroneously required inclusion of a document in the administrative record, that document can be disregarded on appeal. Nor are the district court's rulings on privilege unreviewable. "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Mohawk Industries*, 558 U.S. at 109. Moreover, the government can seek to avoid disclosure of documents as to which it claims privilege by seeking to place them under seal, and by seeking relief from the court of appeals if necessary.

C. The Government Has Not Shown That a Writ of Mandamus Is Appropriate Under the Circumstances

The government argues that mandamus is appropriate because the district court acted outside its powers, and that denying relief would cause unwarranted harm to the government while imposing "minimal burdens" on DACA recipients. *See* Pet. 32-33. This argument misses the mark.

First, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion" can justify the "extraordinary remedy" of mandamus. *Cheney*, 542 U.S. at 380 (internal citations and quotation marks omitted). As explained above, there has been no such abuse of discretion in this case—let alone a "clear" one. To the contrary, it is clear that the administrative record omits documents the agency considered when it decided to terminate DACA. The district court therefore acted within its discretion by ordering the government to complete the record.

Second, the government's decision to revoke longstanding DOJ guidance on the same day that it filed a mandamus petition counsels against mandamus relief. The government was willing to live by its guidance for many years, and it was in effect when the government prepared the administrative record at issue here. There is no compelling reason why this Court should grant the government extraordinary relief from its own longstanding guidance.

Third, the burden on the agency arising from the district court's order is neither unusual nor uniquely onerous. Administrative records resulting from rulemaking proceedings often contain tens or hundreds of thousands of pages of documents, and thus a voluminous page count does not free the government from fulfilling its statutory duty to produce the complete record. *See Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (administrative record "more than a million pages long"). The number of documents at issue here

appears to be much smaller, and the government has already largely borne the burden of producing the additional documents. Of the documents DHS has already compiled, it reports that only "approximately 18,671 documents" are potentially relevant, and only "5,195 documents have been identified" as "needing further, second-level review to ascertain whether they should ... be included in the expanded administrative record." App. Add. 23. Meanwhile, of the documents collected from the Department of Justice, only "1,700 ... have been initially identified as potentially within the scope" of the administrative record ordered by the district court. The burdens of completing this garden-variety document review do not justify the extraordinary remedy of mandamus. Meanwhile, the order directing the government to complete the record was issued on October 17, and the deadline for completion is still nine days away. In all, the three months that will have been allowed for production of the record matches the default period under the district court's local rules. *See* N.D. Cal. Civ. Loc. R. 16-5. This timeframe is not excessively onerous, especially in light of the time-sensitive nature of this case, and is the direct consequence of the government's own arbitrary decision to rescind DACA on March 5, 2018.

Fourth, the burdens alleged by the government pale in comparison to the catastrophic harms that DACA recipients are experiencing as they lose their ability to work and remain legally in this country. Although the government claims that not all 800,000 DACA recipients will be deported by March 2018, all of them must prepare for that possibility and are currently making wrenching choices about whether to

stay in school, take the next steps in their careers, or even begin families. D.Ct. Dkt. 111 at 10-15. It was the government's decision to rescind DACA within such a short period of time that created the urgent need for prompt judicial review in the first place. Although this case can move forward on the incomplete record submitted by the agency, doing so will hamstring the courts' review of the agency's action.

D. At a Minimum, the Court Should Not Grant the Government the Sweeping Relief It Seeks

The government has asked this Court "to halt all expansion of the administrative record and discovery." Pet. 34. For the reasons explained above, the government has not satisfied the extremely demanding requirements for mandamus, and therefore its petition should be denied in its entirety. But even if this Court were to conclude that the government has satisfied the requirements for mandamus as to one or more particular aspects of the district court's order, any writ of mandamus should be limited to those aspects. For example, if the Court were to conclude that mandamus is warranted to exclude from the administrative record what the government represents is a memorandum from the White House Counsel to the President (despite the government's failure to properly raise this issue in the courts below), the writ of mandamus should be limited to that aspect of the district court's order.

In the circumstances of this case, in which the administrative record appears incomplete on its face, both courts below have determined that it is

incomplete, and it has been established that the government omitted non-privileged materials that were directly considered by the decisionmaker, an extraordinary writ of mandamus prohibiting *any* completion of the administrative record clearly is unwarranted. Moreover, it appears from the declarations executed on December 1 that substantial portions of the expanded administrative record are not subject to privilege claims and are ready for production on December 22.

II. The Government Has Not Shown That Certiorari Is Warranted

1. In a single paragraph of its petition, the government suggests that the Court may wish to construe the government's petition as a petition for certiorari and reverse the court of appeals' decision denying a writ of mandamus. Pet. 17. The government does not offer a developed argument in support of certiorari, but instead asserts in conclusory fashion that the court of appeals' decision denying mandamus is "inconsistent with the precedents of this Court, and creates a conflict with decisions of the D.C. Circuit." *Ibid.* These assertions cannot withstand scrutiny.

First, the court of appeals' decision does not conflict with decisions of this Court. Instead, it draws support from decisions such as *Overton Park* and *State Farm*. As noted above, the statements the government relies on from *Florida Power & Light Co. v. Lorion* and *Camp v. Pitts* address the inapposite situation where the administrative record is complete, but a party seeks to generate a new record containing materials that were not before the agency. Similarly, the Court's statements in the *Morgan* cases do not

address the agency's obligation to assemble the "whole record" so that a court can make an objective determination of whether the agency's action is arbitrary and capricious. And *Cheney*, which involved extremely broad discovery requests for White House documents in civil litigation against the Vice President, has little to do with this case.

Second, the Ninth Circuit's decision does not conflict with decisions of other courts of appeals. *San Luis Obispo Mothers for Peace*, on which the government relies, extended *Morgan* to a transcript of deliberations by a multi-member agency. Moreover, several courts of appeals have said that the administrative record includes all materials directly or indirectly considered by the agency decisionmaker. *See, e.g.*, *Thompson*, 885 F.2d at 555; *In re United States*, 2016 WL 5845712, at *1-2. The government cites no cases to the contrary.

Third, even if the government could show that the Ninth Circuit "clearly and indisputably" erred in denying the petition for mandamus, this Court almost never grants a petition for certiorari to correct an erroneous application of well-settled law, and should not depart from its usual practice here. *See* S. Ct. R. 10. And to the extent the government's petition raises any "important question of federal law that has not been ... settled by this Court," *see ibid.*, it is unlikely the government could obtain extraordinary mandamus relief for such an unsettled question.

Fourth, this case is an exceptionally poor vehicle for deciding basic questions about the government's duty to compile the administrative record for judicial

review. Because the case arises in the context of a mandamus petition, the Court will be limited to deciding issues under the highly deferential mandamus standard. In addition, because the case is in an interlocutory posture, the Court does not have the benefit of a full record. Additional proceedings in the district court may shed light on the issues the government raises and could even moot those issues. For example, the government's motion to dismiss and plaintiffs' motion for provisional relief have been fully briefed in the district court and are scheduled for oral argument on December 20. If the lower courts were to determine that the government acted in bad faith or behaved improperly, it is undisputed that the district court would be justified in going beyond the record compiled by the agency. *See* Pet. 20 (quoting *Overton Park*, 401 U.S. at 420). Thus, within a short time, this Court's decision could be overtaken and rendered unnecessary by other developments in the case.

2. If the Court is inclined to rule on the government's more sweeping arguments, the better course would be to treat the petition as a petition for certiorari, grant the petition, and set the case for briefing on the merits and oral argument. Despite the government's arguments to the contrary, its petition raises issues that are neither simple nor well-settled in the government's favor. These include the government's contentions that courts lack authority to order agencies to complete administrative records, that agencies have unreviewable discretion to exclude from the administrative record documents that do not support the agency's action and that the agency regards as privileged, and that agencies are free to narrow the stated reasons for an agency action in

order to limit the scope of the record provided to a reviewing court. The government's arguments have the potential to radically circumscribe judicial review of agency decisions in areas ranging from telecommunications to energy distribution to railroad regulation to the safety of food and drugs. The Court's review of such matters would benefit from following the usual procedures and setting the case for briefing on the merits and oral argument. By allowing additional time for the Court to consider these issues, and for the parties and *amici curiae* to develop and present arguments, the Court can reduce the risk that it will overlook important points or reach an ill-advised decision that could substantially alter judicial review of agency action.

Finally, to the extent the Court's December 8 stay remains in effect, the government would not be prejudiced by setting this case for merits briefing and oral argument.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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December 2017

No. 17-801

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, *et al.*,
Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA AND THE CITY OF SAN JOSE IN OPPOSITION

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December 13, 2017

QUESTION PRESENTED

Whether the federal defendants have established a clear and indisputable right to mandamus relief from this Court (i) barring the district court from ordering completion of the administrative record for plaintiffs' Administrative Procedure Act claims, (ii) resolving privilege objections that defendants have not yet properly raised in any court, or (iii) addressing similarly unripe discovery disputes relating to plaintiffs' non-APA claims.

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STATEMENT

1. Nearly 800,000 young people have received protection under the Deferred Action for Childhood Arrivals program. Stay Opp. 4; D.Ct. Dkt 1 at 8.[1] DACA grants a renewable two-year deferral, during which recipients are protected from removal and may apply for certain public and private benefits, including work authorization. *See* Pet. App. 48a-50a; D.Ct. Dkt 1 at 7-10.

From DACA's inception in June 2012 until September 5 of this year, federal authorities repeatedly defended the legality of the program. *See, e.g.*, Stay Opp. 5-6; D.Ct. Dkt. 64-1 at 21 n.8 (2014 OLC memorandum); *cf.* D.Ct. Dkt. 64-1 at 230 (preserving DACA when other immigration policies were rescinded in February 2017). In 2015, the Fifth Circuit upheld a preliminary injunction secured by Texas and other States against a separate policy, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), on Administrative Procedure Act and statutory grounds, and in 2016 this Court affirmed that judgment by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), *aff'g Texas v. United States*, 809 F.3d 134, 146 (2015).

In June 2017, attorneys general from Texas and nine other States threatened to add a challenge to DACA to their still-pending DAPA litigation unless the Department of Homeland Security (DHS) moved to terminate the program by September 5. D.Ct. Dkt. 64-1 at 238-239. Subsequently, the President made clear that any decision to terminate the program would be "a decision that I make, and it's a decision that's very very hard to make." Stay Opp. 7 & n.3.

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[1] Citations to the district court docket are to N.D. Cal. Case No. 17-cv-5211.

On September 4, Attorney General Sessions sent Acting DHS Secretary Elaine Duke a one-page letter advising that DACA was "an unconstitutional exercise of authority by the Executive Branch." D.Ct. Dkt. 64-1 at 251. He summarily asserted that DACA "has the same legal and constitutional defects" as DAPA, and that "potentially imminent litigation" would "likely" result in its being enjoined. *Ibid.*

On September 5, the Attorney General (not Acting Secretary Duke) announced DACA's termination. *See* D.Ct. Dkt. 1-3 at 2. In addition to reiterating the Administration's new legal position, he suggested a number of policy reasons for the decision: in his view, DACA had "contributed to a surge of unaccompanied minors" at the border and "denied jobs to hundreds of thousands of Americans," and rescinding it would "make us safer" and "further economically the lives of millions who are struggling." *Id.* at 2-3.

The same day, Acting Secretary Duke formally rescinded DACA, citing only the appellate rulings in the DAPA litigation and the Attorney General's letter. *See* Pet. App. 67a. She instructed DHS to stop accepting DACA applications, and to accept renewal applications for a brief period only from individuals whose deferred action would expire on or before March 5, 2018. *See id.* at 67a-68a. Those whose protection would expire after March 5 could not renew. *See ibid.* Later that day, President Trump announced that "Congress now has 6 months to legalize DACA . . . If they can't, I will revisit this issue!" D.Ct. Dkt. 1 at 11.

2. The plaintiffs in these five actions allege that defendants' rescission of DACA violated the Administrative Procedure Act, the Fifth Amendment, and

other laws.[2] They contend in part that the termination decision was arbitrary and capricious because defendants reversed existing policy without sound justification and without adequately addressing the consequences for DACA grantees. *See, e.g.*, D.Ct. Dkt. 111 at 15-31.

Recognizing that thousands of young people would begin to lose DACA status starting March 5, the district court sought to manage the cases so final judgment and appellate review could be completed before then. C.A. Dkt. 13 at 59 (transcript). Defendants indicated they could produce the administrative record by October 6. *See id.* at 69-70. The court made clear that it expected a full record, and that defendants should not "put[] in there what helps them and . . . leave out what hurts them." *Ibid.*

On October 6, defendants proffered an administrative record consisting of fourteen documents. All the documents were already publicly available, and 192 of the 256 pages consisted of court opinions in the DAPA litigation. Pet. App. 5a-6a; *see* D.Ct. Dkt. 64-1.

Plaintiffs moved for completion of the administrative record, production of a privilege log, and a ruling on certain privilege issues. *See* D.Ct. Dkt. 65. After briefing and argument, the district court partially granted the motion. *See* Pet. App. 42a-44a. It recognized that APA review is to be "based on 'the whole record,'" ensuring that an agency is not "'withholding evidence unfavorable to its position.'" *Id.* at 29a.

The record proffered by an agency is presumed complete; but that presumption may be rebutted "by clear evidence[] that the agency relied on materials not already included in the record." Pet. App. 29a-30a.

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[2] *See* N.D. Cal. Case Nos. 17-cv-5211, 17-cv-5235, 17-cv-5329, 17-cv-5380, and 17-cv-5813.

Here, the court found that plaintiffs had rebutted the presumption. The proffered record did not contain "a single document from . . . [Acting] Secretary Dukes' subordinates" or advisers from other parts of the government; "any materials analyzing the [threatened] lawsuit or other factors militating in favor of and against the switch in policy"; any documents regarding the agency's February 2017 decision to retain DACA; or even news articles that defendants conceded the Acting Secretary had personally reviewed. *Id.* at 34a-35a; *see id.* at 31a-37a.

The district court directed defendants to complete the record with all materials "directly or indirectly considered in the final agency decision to rescind DACA," within specified limits. Pet. App. 42a. In particular, it ordered the inclusion of (non-privileged) documents in the following categories: materials actually seen or considered by the Acting Secretary; materials considered by persons, at DHS or elsewhere in the government, who then provided written or oral input directly to the Acting Secretary; comments or questions from the Acting Secretary herself, and the responses; and materials considered by the former Secretary when he decided, in February 2017, *not* to rescind DACA. *See id* at 42a-43a.

The court confirmed that privileged documents need not be included in the filed record (Pet. App. 43a); they were instead to be noted on a privilege log and submitted for *in camera* review (*see id.* at 40a-43a). Regarding 84 documents that defendants asserted were privileged and had previously submitted for review, the court agreed that 49 were privileged, but ruled that 35 should be included in the record in whole or in part. *See id.* at 43a; D.Ct. Dkt. 71-2 (privilege log). Those documents included media commentary regarding DACA that "government counsel admitted

. . . the Acting Secretary had seen." Pet. App. 36a. Under the particular circumstances of this case, the district court also found that defendants had waived attorney-client privilege for documents evaluating DACA's legality. *See id.* at 37a-39a.

Concurrently with these proceedings on the administrative record, plaintiffs sought discovery on their *non-APA* claims. While the district court generally permitted that discovery to proceed and the parties have pursued some disputes with a magistrate judge, no motion to compel or for a protective order has been presented to the court. As noted below, all discovery is currently subject to a stay entered by the district court. Pet. App. 45a-46a.

3. The court of appeals denied defendants' petition for a writ of mandamus barring completion of the administrative record. Pet. App. 1a-15a. Applying the stringent standard for such relief, it held that "the district court did not clearly err by ordering . . . completion." *Id.* at 3a.

The court of appeals first found no clear error in the conclusion that the presumption of completeness had been rebutted. Pet. App. 6a-8a. Among other factors, it reasoned that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible, as the district court concluded." *Id.* at 6a-7a (footnote omitted). It also explained that the record "consists of all materials '*considered by* agency decision-makers,' not just those which support or form the basis for the agency's ultimate decision." *Id.* at 8a (citation omitted). The court further reasoned that the district court's decision to include "materials considered by subordinates who then briefed the Acting Secretary" was "consistent

with the rulings of other district courts, comport[ed] with the Department of Justice's guidance on administrative records, and [was] not foreclosed by Ninth Circuit authority," and thus "was not clear legal error." *Id.* at 9a, 11a. Likewise, requiring inclusion of materials underlying the earlier decision to retain DACA was not clear error where "both decisions were part of an ongoing decision-making process." *Id.* at 11a-12a.

The court of appeals was "[]mindful of . . . separation-of-powers concerns," but disagreed that *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), barred "completion of the administrative record with any White House materials." Pet. App. 3a, 12a. *Cheney* involved "'overbroad'" discovery requests, not "an administrative agency's [statutory] obligation . . . to provide the court with the record underlying its decision-making"; it imposed no "categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 12a-13a. Here, moreover, there was "no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record." *Id.* at 13a.

The court also rejected the argument "that it was clear legal error to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege on an individual basis." Pet. App. 13a. It noted that many district courts had "required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases," and the absence of circuit precedent weighed strongly against a finding of clear error. *Id.* at 14a. As to particular privilege determinations, defendants had "provided little . . . argument regarding the specific

documents ordered disclosed by the district court," leaving the court "unable to conclude . . . that the district court's privilege analysis was clearly erroneous." *Id.* at 12a n.8.

Judge Watford dissented. Pet. App. 16a-20a. He agreed that rescinding DACA would "profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand." *Id.* at 16a. But he agreed with defendants that an agency generally may choose what it submits to support a decision, that "pre-decisional materials" are "ordinarily not part of the administrative record," and that plaintiffs had not established the basis for any exception to these principles, at least "at this stage of the case." *Id.* at 16a-19a.

4. After the court of appeals denied mandamus, the district court directed defendants to complete the administrative record by November 22. D.Ct. Dkt. 188. On November 17, defendants asked the court of appeals to stay its mandamus denial while defendants sought review by this Court. C.A. Dkt. 36 at 9. On November 19, plaintiffs asked the *district* court to stay record completion, as well as the pending discovery on non-APA claims, until it ruled on the pending motions by defendants to dismiss and by plaintiffs for a preliminary injunction, since those rulings could clarify or moot certain issues. D.Ct. Dkt. 190 at 1-4. Defendants then asked the district for a stay pending proceedings in this Court. D.Ct. Dkt. 191 at 2.

On November 20, the district court moved the deadline for record completion (and stayed the non-APA discovery) until December 22, two days after the hearing on the pending motions. *See* Pet. App. 45a. It noted that defendants should continue to "locate and

compile the additional materials" to complete the record, "to have a realistic opportunity to reach a final decision on the merits before [DACA's] March 5 termination date." *Id.* at 45a-46a.

The court of appeals dismissed defendants' stay motion on November 21. C.A. Dkt. 42. On December 1, defendants filed the present petition and sought a stay from this Court. On December 8, this Court stayed the district court's orders pending disposition of the petition, "to the extent they require discovery and addition to the administrative record filed by" defendants.

ARGUMENT

The core requirements for a writ of mandamus from this Court are a clear and indisputable right to relief and a lack of any other adequate means to attain it. Here, the federal defendants' principal argument is that the administrative record in an APA proceeding is whatever an agency says it is—a court has no power to order the record completed, they say, even if there are clearly non-privileged materials the agency considered but has not provided. That novel position, which the Executive Branch only recently began aggressively advancing, is not "indisputably" correct. Indeed, it is indefensible.

Defendants also broadly challenge privilege rulings already made by the district court, and point to that court's intention to review additional materials if defendants claim they are privileged. They suggest a need for immediate relief from this Court because if disputed materials are disclosed "there will be no going back." Pet. 18. This Court has held that privilege issues ordinarily are adequately reviewed on appeal. This case is unusual, and if the Court is not confident that, in this instance, ordinary mechanisms will suffice to protect legitimate privilege interests, it

might direct the lower courts to ensure that no contested material is made public without a full opportunity for litigation and review. This Court, however, has no record or argument before it that would allow it to address defendants' document-specific claims in the first instance, even if that were a desirable procedure.

Finally, defendants repeatedly allege that discovery on plaintiffs' non-APA claims will be unduly burdensome. Discovery disputes, too, are not ordinarily managed by mandamus, especially when (as here) they have never been presented to the lower courts. In any event, the district court has stayed all discovery until after it hears upcoming motions, and its rulings on those motions could substantially affect the need for or nature of any future review. In the meantime, there is no basis for mandamus relief from this Court.

I. DEFENDANTS HAVE NOT SATISFIED THE REQUIREMENTS FOR MANDAMUS RELIEF

To justify an extraordinary writ, petitioners "must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. Mandamus, in particular, is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). The federal defendants must show first that they have "no other adequate means to attain the relief" they seek, and second "that they have a "clear and indisputable" right to that relief. *Id.* at 380, 381. Even then, the Court "must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381.

A. Defendants Have Other Adequate Means of Relief

Mandamus petitioners must show they have no other adequate means to attain relief "to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-381. Here, defendants assert that "the district court's orders will be effectively unreviewable on appeal from final judgment." Pet. 18. That is incorrect.

Defendants' arguments relate principally to the scope and composition of the administrative record. Pet. 19-31. Those issues can be addressed on appeal—as demonstrated by leading decisions on the required contents of the record. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 737, 739 (10th Cir. 1993); *Dopico v. Goldschmidt*, 687 F.2d 644, 646, 654 (2d Cir. 1982). Here, an appellate court could decide if the district court erred in ordering defendants to complete the record and, if so, could consider only defendants' fourteen-document record in ruling on plaintiffs' APA claims. And as to specific privilege rulings, "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of" privileges. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009).

Defendants contend that without immediate relief they will need to review "thousands of additional documents" in a compressed period. Pet. 18; Stay Reply 1. But the burden of having to produce a complete record is not a basis for extraordinary relief; and as to specific timing, defendants have never asked the lower courts for an accommodation tailored to any particular need. Rather, they have sought a complete exemption from the obligation to produce a proper administrative record. Defendants also argue (Pet. 18) that there will

be "no going back" if privileged materials are improperly made public; but they have never asked the lower courts to allow filing under seal or impose protective orders as to specific materials pending later appellate review of privilege disputes. For that matter, they have never given the lower courts the specific information or arguments necessary to support their assertions of privilege, including concerning White House documents. *See* Pet. App. 12a n.8. Like other litigants, the federal defendants must pursue all ordinary avenues for relief before seeking an extraordinary writ. *In re Shalala*, 996 F.2d 962, 965 (8th Cir. 1993) (denying mandamus where "the Secretary has other avenues to attain the relief she desires").[3]

This case is by necessity proceeding quickly, and may involve particularly sensitive issues of government confidentiality and privilege. If this Court believes that normal mechanisms might not be adequate to protect legitimate interests in this context, it could make clear to the lower courts that before orders having arguably irreversible consequences, such as public disclosure of contested materials, may take effect, defendants must be accorded a full, fair, and orderly opportunity to make their arguments for non-disclosure—first in the district court and then by petition or appeal. Apart from perhaps providing such procedural guidance for the lower courts, however, it would surely be both unrealistic and premature for this Court to seek to review specific administrative-record

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[3] As to the potential for resumed discovery on non-APA claims after the district court's current stay ends on December 22, in the ordinary course defendants could serve specific objections to plaintiffs' discovery requests; meet and confer with plaintiffs; pursue protective orders or resist motions to compel; and seek targeted mandamus relief as to any specific ruling they claim is clearly erroneous and exceptionally important.

or privilege issues at the present juncture, in the context of emergency writ proceedings.

B. Defendants Have No "Clear and Indisputable" Right to Relief

Defendants contend that the district court has violated "bedrock principles" of APA review. Pet. 5; *see id.* at 19-31. But the principles they espouse are not supported by the APA itself or by this Court's precedents, and conflict with longstanding practice of both lower courts and federal agencies (including, until very recently, the Department of Justice). The Executive Branch has recently adopted a new and aggressive view of the proper limits of an administrative record. But that view is far from clearly and indisputably correct, and it is not a proper basis for mandamus.

1. Scope of the administrative record

Defendants first contend that judicial review of federal agency action must be limited to the documents that an agency unilaterally selects for submission to the court. *See* Pet. 19-20, 23-24. They read this Court's decisions as limiting APA review to "'the record the agency presents to the reviewing court'" (Pet. 20 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)))—which they interpret to mean whatever the agency chooses to present. They also appear to believe that courts are powerless to order an agency to complete the administrative record, even where it is apparent that the documents handpicked by the agency do not include all of the materials that were before the agency when it made its decision. *See* Pet. 20; *see also* Pet. App. 6a-7a, 31a-36a.[4]

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[4] Defendants now assert that the fourteen-document record they produced on October 6 includes "all non-deliberative materials

Defendants' position finds no support—let alone any clear or indisputable grounding—in the APA or this Court's cases. On the contrary, the APA directs that review of agency decisions "shall" be conducted based on "the whole record." 5 U.S.C. § 706. The "whole record" means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

As Congress recognized, access to the whole record is essential to fair and effective judicial review under the APA. *See* 5 U.S.C. § 706.[5] In arbitrary-and-capricious review, for example, courts must consider in part whether an agency has explained its decision in a way that "runs counter to the evidence before [it]," or failed to offer a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, defendants argue that their decision, although deeply affecting 800,000 people, "was not based on any factual findings or particular evidentiary record." Stay Reply 1. But even when an agency has broad authority or can choose among different policy goals, its decisions must not be "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). And a court cannot

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. . . considered by the Acting Secretary in reaching her decision to rescind" DACA. Pet. 7. That is not what they told the lower courts. *See* Stay Opp. 24 n.10; Pet. App. 36a; C.A. Arg. Video 54:18-54:53, 57:02-57:44.

[5] *See* S. Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."); H.R. Rep. No. 1980, 79th Cong., 2nd Sess. 46 (1946) (same); *cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-490 (1951) (discussing history of APA "whole record" requirement in context of review of formal agency factfinding).

meaningfully apply that standard if it cannot tell what information the agency had before it when it made its choice.

Defendants quote selectively from *Florida Power* and *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam). *See* Pet. 20, 24. Those cases started from the premise that the agency had already satisfied its statutory obligation to produce the whole record. In *Florida Power*, the Court contemplated judicial review based on "the record before the agency." 470 U.S. at 744. In *Camp*, the Court observed that the "*entire* administrative record was placed before" the district court. 411 U.S. at 139 (emphasis added). Neither case held—or even suggested—that agencies have unreviewable discretion to pick and choose what to include in the record they present for review by the courts. *Camp* and *Florida Power* stand only for the proposition that when an agency action cannot be sustained based on the *whole* record that was before the agency, the proper remedy is "to remand to the agency for additional investigation or explanation"—not "to conduct a *de novo* inquiry into the matter being reviewed" and create a *new* record in the district court. *Florida Power*, 470 U.S. at 744; *see Camp*, 411 U.S. at 142.

Defendants identify no lower-court authority supporting their position. *See* Pet. 19-26. On the contrary, lower courts recognize that an "agency may not unilaterally determine what constitutes the Administrative Record," and require that APA review be conducted based on the entire record that was before the agency. *Bar MK Ranches*, 994 F.2d at 739 ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."); *see, e.g.*, *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C.

2001). Where there is good reason to believe the whole record has not been produced, courts across the Nation order that it be completed.[6]

Defendants argue that a court may order inclusion of additional documents "only" based on a showing of bad faith or improper behavior. Pet. 20, 26. That argument conflates two different concepts. Although courts and commentators sometimes use similar terms imprecisely, there is a difference between *supplementing* an administrative record and ordering an agency to *complete* the record it has proffered for review. A court may supplement even a facially complete record, including through discovery or depositions, based on "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. That showing is not necessary, however, to order an agency to complete the record where "it appears the agency has relied on documents or materials not included in the [originally filed] record." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.).

The principle that courts may order completion of an incomplete administrative record is an "explication of the rule that judicial review is based upon the full administrative record in existence at the time of the agency decision." *Pub. Power*, 674 F.2d at 794. As the Administrative Conference of the United States has recognized, "completion may be appropriate" where, as here, "the presumption of regularity has been rebutted" because "there are credible allegations that

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[6] *See, e.g., Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 24-25 (D.D.C. 2016); *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1269 (D. Colo. 2012); *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996).

the administrative record" the agency proffered "for judicial review is incomplete." *See* ACUS Recommendation 2013-4: The Administrative Record in Informal Rulemaking 11-12 (adopted June 14, 2013).[7]

Defendants' argument also conflicts with the longstanding practice of federal agencies, including the Department of Justice. Until very recently, DOJ guidance had followed established precedent by instructing federal agencies that "[t]he administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision." U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record 1-2 (Jan. 1999) (DOJ Guidance).[8] DOJ advised that the record "is not limited to documents and materials relevant only to the merits of the agency's decision," and "includes documents and materials relevant to the process of making the agency's decision," regardless of "whether they support or do not support the final agency decision" or were "specifically considered by the final agency decision-maker." *Id.* at 2.

On the very day that it filed its mandamus petition in the court of appeals in this case, DOJ instructed other agencies to "disregard[]" that longstanding guidance. Pet. App. 10a-11a; C.A. Dkt. 15 at 28.[9] Defendants now characterize the revoked guidance as merely

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[7] *Available at* https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf.

[8] *Available at* http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

[9] In revoking its prior guidance, DOJ noted that the guidance was contrary to positions it had taken in another mandamus petition, *In re Thomas E. Price*, Ninth Circuit No. 17-71121. *See* C.A. Dkt.

"suggest[ing]" that agencies should take a "cautious approach" by "includ[ing] more than the law requires in the record." Stay Reply 6 n.2; *see* Pet. 24-25 & n.5. But the guidance correctly stated what longstanding appellate precedent requires. *Compare* DOJ Guidance 1-2, *with Thompson*, 885 F.2d at 555. DOJ is free to argue that it was wrong then and is right now. But its own adherence to a different and more reasonable position until less than two months ago is powerful evidence that the district court's adherence to that position was not clear and indisputable error.

Moreover, if defendants' new position became the law, it would profoundly interfere with the ability of courts to review agency decisions. For a court "to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The APA thus "requires review of 'the whole record,'" because a review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Ibid.* Giving a federal agency unfettered discretion to decide the contents of the administrative record would allow it to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). That would hamstring judicial review by forcing it to proceed based on "a fictional account of the actual decisionmaking process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

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15 at 28. That pending petition seeks mandamus regarding a district court order requiring an agency to complete the record with certain pre-decisional materials and provide a privilege log for withheld documents. It was filed on April 19, 2017.

Defendants suggest that they are relieved of their obligation to produce a complete record here "in light of the nature of" the agency decision. Pet. 20. They note that the APA defines the record of formal administrative proceedings, but "does not contain a parallel provision prescribing the contents of the administrative record for informal agency actions" like the one at issue here. Pet. 28 (discussing 5 U.S.C. § 556(e)). That, however, is no reason the agency should simply be able to choose "what belongs in the record it compiles." Pet. 29. To the contrary, the absence of specific guidelines is a reason for courts to be even more vigilant in policing the general statutory requirement that agencies produce the "whole record." 5 U.S.C. § 706.

Finally, defendants fare no better in arguing that they are excused from producing any "factual or evidentiary record" because, they say, terminating DACA was a "policy determination" based on concerns about threatened litigation. Pet. 20, 21. Congress has required review to be based on the whole record before the agency, regardless of the proffered reason for the agency's decision. *See* Pet. App. 8a. Whether the "litigation risk" rationale proffered here is arbitrary and capricious cannot be evaluated without consulting the whole record that was before the agency. Among other things, any rational assessment of how to respond to litigation risk would balance that threat against the costs to be inflicted on the government and the economy by abandoning a policy that allowed hundreds of thousands of residents to obtain work authorization and other benefits. A court cannot properly evaluate the termination decision, even deferentially, without knowing what factual information was before the agency regarding those costs. *See generally State Farm*, 463 U.S. at 42 (arbitrary-and-capricious review considers whether agency decision "is rational" and was "based on consideration of the relevant factors");

cf. Pet. App. 8a, 35a. Yet the administrative record proffered by defendants includes not a single document addressing such obvious "policy" aspects of defendants' decision.

2. Exclusion of "deliberative" documents from the record

Defendants next contend that an agency may unilaterally exclude any pre-decisional document it deems to be "deliberative" from the administrative record it proffers to a reviewing court, without affording plaintiffs or the courts any opportunity to understand or challenge those exclusions. *See* Pet. 27-31. Defendants characterize this argument as a "fundamental principle[]" of judicial review (*id.* at 19), and as one that "*this Court*" has adopted (*id.* at 30). But they cite no precedent from this Court actually supporting it—let alone establishing it as clearly and indisputably correct.

Instead, defendants invoke decisions reflecting the settled rule that courts reviewing administrative-law claims generally should not "probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan I*); *see* Pet. 27. The *Morgan* line of cases involved formal agency adjudications, in which the government had produced administrative records comprising thousands of pages of documents that were before the agency. *See Morgan I*, 304 U.S. at 16; *United States v. Morgan*, 313 U.S. 409, 417, 422 (1941) (*Morgan II*). In that context, the Court observed that it was inappropriate to depose the Secretary regarding administrative-law claims, *see Morgan II*, 313 U.S. at 422, or to probe the Secretary's "mental processes" in making a decision, *Morgan I*, 304 U.S. at 18; *but see Overton*

Park, 401 U.S. at 420 (courts "may require the administrative officials who participated in [a] decision to give testimony" based on "a strong showing of bad faith or improper behavior"). Neither those cases nor other decisions of this Court hold that an agency may exclude all "pre-decisional documents" (*e.g.*, Pet. I) from the record it proffers for review based solely on its own unilateral determination that all such documents are subject to the deliberative process privilege.

On the contrary, such documents routinely appear in administrative records produced by federal agencies and reviewed by courts. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017) (pre-decisional memorandum analyzing evidence before the agency). And before changing its mind partway through this litigation, DOJ itself advised federal agencies that records supporting informal agency action should include emails, notes, draft documents circulated for comment, minutes or transcripts of meetings, decision documents, and other pre-decisional materials. DOJ Guidance 3-4; *see also id.* at 4 (agencies should prepare log for documents withheld on privilege grounds).

The inclusion of pre-decisional information is essential to the fair and effective review of agency action. Courts conducting APA review necessarily must assess whether an agency's decision is objectively valid by considering the materials that were before the agency at the time it made its decision. Those materials are, by definition, "pre-decisional." Depriving courts of all such materials would make it impossible for them to determine, for example, whether an agency explained its decision in a way that "runs counter to the evidence before" it. *State Farm*, 463 U.S. at 43.

Of course, certain materials will be protected from public disclosure under the deliberative process privilege or otherwise. *Cf.* Stay Reply 7 (discussing materials analogous to "a law clerk's bench memorandum"). The district court here acknowledged as much by directing that defendants could withhold material from the publicly filed record "based on deliberative-process, or any other privilege." Pet. App. 43a. It simply required that they log the document, assert any claimed privilege, and make the document available for *in camera* review by the court. *Ibid.*

But defendants are quite wrong to suggest that *every* pre-decisional agency document not otherwise public is automatically excludable, without any obligation on the agency to identify the exclusion or assert a specific basis for it. That position ignores the requirements for successful assertion of the deliberative process privilege. First, the document must truly be "deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). That is, the document must "reflect advisory opinions, recommendations and deliberations comprising" the process leading to a government decision. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The privilege does not protect "material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737. Second, the "deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need"—a determination courts must make "on a case-by-case, ad hoc basis." *Ibid.*; *see Warner Commc'ns Inc.*, 742 F.2d at 1161.

Defendants' position would convert the deliberative process privilege from a qualified, common-law

privilege to a categorical exclusion from the statutory requirement to produce the "whole record." 5 U.S.C. § 706. It would make an agency the sole arbiter of whether its own document is privileged, and deprive courts of any opportunity to test whether a document is truly deliberative or to decide whether the privilege has been overcome.

Finally, defendants contend that D.C. Circuit precedent supports their arguments about "deliberative" documents. *See* Pet. 27-28 & n.6. Even if that were correct, it would not establish that a district court in a different circuit clearly erred by following a contrary approach, or that defendants have any clear and indisputable right to relief from this Court. But defendants substantially over-read the cited cases, which involved formal adjudications before multi-member agencies. In that context, the D.C. Circuit has rejected efforts to disclose the contents of "secret . . . deliberations" between agency members, likening such disclosure to scrutiny of "judicial deliberations." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (opinion of Randolph, J.). In *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 789 F.2d 26 (D.C. Cir. 1986), for example, the court refused to supplement the administrative record with transcripts of private and pre-decisional deliberations between the members of a multi-member commission. *Id.* at 44-45; *see also Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (transcript of "actual deliberations" of the FCC in challenge to decision made during formal adjudication).[10] At most, those cases support a rule that actual deliberations of multi-member agencies

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[10] The remaining D.C. Circuit case cited by defendants, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998), did not involve APA review of agency action.

during formal adjudications may be excluded from the administrative record because they could reveal the "collective mental processes of the agency." *San Luis Obispo*, 789 F.2d at 44. The cases do not support defendants' apparent position that an agency headed by a single decision-maker may exclude from the record any or all pre-decisional documents that were part of an informal decision-making process.[11]

3. Privilege rulings

Defendants also seek mandamus regarding privilege rulings by the district court, including its conclusions that privileges either do not apply or have been overcome with respect to certain documents the court already reviewed *in camera*. *See* Pet. 31-33. But appellate courts are properly reluctant to use mandamus to address pretrial privilege disputes, since doing so would invite endless "'piecemeal appellate litigation.'" *In re Shalala*, 996 F.2d at 964.

Defendants fault the district court for "summarily dismissing" privilege claims with respect to 84 documents collected from the Acting Secretary's office. Pet. 31. But the district court reviewed each of those documents *in camera*, agreed with defendants that 49 should be wholly excluded from the record, and agreed

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[11] Excluding from the record the private deliberations of multi-member agencies in formal adjudications does not frustrate judicial review, because the record on review includes the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e); *see, e.g.*, *Checkosky*, 23 F.3d at 489 (opinion of Randolph, J.) (SEC record contained "3,800 pages of transcript and 350 exhibits"). That is, the court has before it the same "whole record" that the agency members were privately deliberating *about*. For informal decisions, however, defendants' proposed rule would allow agencies to exclude all but a handful of relevant documents from the record on review, as defendants did in this case.

that two others should be withheld in part. Pet. App. 43a. The court made these rulings on an expedited basis, without briefing or argument (*see* Pet. 31); but defendants do not explain why, if they have specific arguments to make about those documents, they have not made them to the lower courts in the eight weeks since the initial ruling. They could have, for example, made the assertions and factual showings essential to certain privilege claims. *See, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). Instead, they have offered only general and sweeping arguments in appellate filings.

As noted above, if this Court is concerned that arguably privileged material might be publicly disclosed before defendants had a fair opportunity to present their arguments or obtain review, it could direct the lower courts to ensure that does not happen. For example, the courts could use sealed filings, protective orders, and similar mechanisms. But defendants certainly have not provided this Court (or the court of appeals) with any basis for holding that individual privilege rulings made by the district court—about documents that only defendants and the district court have seen—are clearly and indisputably wrong. *See* Pet. App. 12a n.8 (defendants "provided little in the way of argument regarding the specific documents ordered disclosed by the district court").

Defendants' privilege arguments about White House documents suffer from a similar shortcoming. Their petition is punctuated with concerns about the possibility that documents originating from the White House complex might be part of the administrative record. *See* Pet. 17-18, 22, 25-26, 30-32. Nowhere, however, do they carry their burden of showing that they are clearly and indisputably entitled to relief

from any particular ruling of the district court regarding such documents.

Defendants asserted "executive privilege" with respect to seven documents reviewed *in camera* by the district court, three of which the court agreed should be excluded from the record. *See* D.Ct. Dkt. 71-2; Pet. App. 43a. None of those documents was found at the White House. Rather, they were "[p]hysically in the acting Secretary's office." C.A. Dkt. 13 at 167. There is no support for a conclusion that any document originating from the White House, which was received and reviewed by the agency decision-maker, is categorically exempt from an administrative record. Nor have defendants established that the district court clearly erred in holding that the four documents it ordered included in the record did not meet the criteria for protection under the presidential communications privilege. *See generally Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). Indeed, defendants do not even address three of the documents in their petition. They do assert (for the first time in this Court) that the fourth document is a "*memorandum from the White House Counsel to the President.*" Pet. 32. If that is true, then it may well be privileged. But defendants never made that argument below, and did not even include information about the drafter or intended recipient of the document in their privilege log. *See* Dkt. 71-2 at 2 (privilege log entry for DACA_RLIT00000069).

As to the documents of White House staff who directly advised the Acting Secretary, defendants again fail to present the courts with the factual information needed to support their arguments. They repeatedly invoke *Cheney* (Pet. 17 n.2, 18, 22, 26, 30, 32, 33), treating that decision as if it categorically

frees the Executive Branch from having to collect documents from the White House complex for purposes of judicial review. But *Cheney* involved "overly broad discovery requests" directed at the Vice President and other members of an internal White House working group established "to give advice and make policy recommendations to the President." 542 U.S. at 372, 386. The Court in *Cheney* was given a concrete understanding of the burden that would result from those requests. Under the circumstances, it held that the Executive Branch should not be required to "winnow the discovery orders by asserting specific claims of privilege and making particular objections." *Id.* at 389.

Here, no one can conduct the type of balancing analysis contemplated by *Cheney*, *see* 542 U.S. at 385, without further information from defendants about the burdens they argue will result from the district court's order directing them to complete the record. Defendants have presented the lower courts with no information about the number of staff or the volume of documents at the White House complex implicated by that order. Nonetheless, the district court was mindful of the need to avoid any undue burden. It required inclusion in the administrative record only of DACA-related documents considered by those White House staff who then directly communicated advice, direction, or other "input" to the Acting Secretary concerning termination of DACA. And it underscored that defendants were under no obligation to "scour the . . . White House for documents for inclusion." Pet. App. 43a-44a. If, based on information about this decision-making process that was not available to the district court (or plaintiffs), defendants believed that such a requirement would burden the White House in a manner akin to the discovery requests in *Cheney*, they could and should have presented that information to

the courts below. *Cf. Cheney*, 542 U.S. at 388-389 (noting that the government squarely presented its arguments about burden to the district court.) Indeed, they can still do that. They should not, however, be granted extraordinary mandamus relief by this Court based on vague and unsupported assertions about the burdens of compliance, or on information never presented to the courts below. *See* Pet. 26 (suggesting, for the first time, that the President and Vice President's documents fall within the scope of the order).

Finally, defendants attack the district court's ruling that they waived the attorney-client privilege regarding certain communications with or within the Department of Justice bearing "on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." Pet. App. 39a; *see* Pet. 32. But they mischaracterize the nature of that ruling. The district court did not hold "that an agency waives its attorney-client privilege on a categorical basis simply by weighing legal risks or announcing a particular view of the law." Stay Appl. 25; *see* Pet. 32. Indeed, it flatly rejected that overbroad characterization. *See* Pet. App. 38a. The court based its ruling on the particular circumstances of this case. Defendants terminated a longstanding policy they had previously repeatedly defended as legally valid; the sole proffered explanation was an about-face by the Attorney General regarding the legality of that policy (Pet. App. 67a); and defendants disclosed the Attorney General's one-page conclusion (D.Ct. Dkt. 64-1 at 251), but not any significant explanation or analysis of the change. Under those unusual circumstances, the district court found a limited waiver based on the settled principle that a litigant may not use the attorney-client privilege as both a sword and a shield. Pet. App. 37a. Defendants have not established any clear and indisputable right to relief from that ruling.

4. Discovery on non-APA claims

Defendants also argue that the district court clearly and indisputably erred by "authorizing intrusive discovery" on plaintiffs' non-APA claims. Pet. 19. To the extent this argument refers to the case management order of September 22 authorizing a limited number of "narrowly directed" discovery requests (Pet. App. 22a), the argument is waived and will soon be moot.

Defendants suggest that the district court should not have authorized any discovery without first considering their arguments "concerning the district court's jurisdiction and the reviewability of DHS's decision." Pet. I. But after learning that the district court was inclined to permit some focused discovery because of the exigencies of this case, defendants opted *not* to file a prompt motion to dismiss that the district court could have ruled on before discovery responses were due. *See* C.A. Dkt. 13 at 74-75. And instead of presenting the district court with legal arguments about why discovery was categorically inappropriate, they participated in discovery, making six witnesses available for depositions. *See* Pet. 12.

In any event, even before this Court issued its recent stay, the district court had stayed all discovery until at least December 22. On December 20, the district court will hear argument on the motion to dismiss that defendants eventually filed (six weeks after the case management conference). If the court rejects defendants' jurisdiction and reviewability arguments, that will address their concern about discovery proceeding before any ruling on those issues. If it grants the motion in whole or in part, that could reduce or eliminate defendants' obligation to respond to the stayed discovery. Either way, defendants' concerns

about the now-stayed order authorizing discovery provide no basis for mandamus relief.

Nor do defendants' arguments about specific discovery issues warrant relief from this Court. Again, defendants have not yet presented any such issues to the district court and it has not yet ruled on them. Defendants contend that the court "allowed broad discovery into the subjective motivations of the Acting Secretary and those who advised her, including White House officials." Pet. 6. But to the extent that argument is intended to conflate *non-APA* discovery that was authorized by the case management order with the separate order requiring defendants to complete the administrative record, the Court should recognize that the two issues are quite distinct. And to the extent defendants are challenging the scope of the non-APA discovery, they have never raised a single discovery issue with the district court. For example, they argue about the burden of responding to written discovery requests (Pet. 11-12), and offer detailed theories about why such discovery is inappropriate under the circumstances of this case (*id.* at 23). But they have not served objections or responses to those requests—let alone sought a protective order from the district court or resisted a motion to compel. There is no basis for this Court to grant a writ of mandamus "directly to the district court" (Pet. 17) regarding issues on which the district court has never ruled, or even been asked to rule. *See* Pet. App. 2a-3a n.1 ("[i]ssues regarding . . . the propriety of discovery on the non-APA claims, including the propriety of depositions, are not properly before us at this time").

C. Mandamus Is Inappropriate Under the Circumstances of This Case

The last consideration governing mandamus relief is whether "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. Here, the federal government abruptly decided to terminate a longstanding policy affecting hundreds of thousands of young people and to set an arbitrary March 5, 2018 deadline for those individuals to begin losing their protection and work authorization. The district court is doing its best to fairly adjudicate claims as to the legality of that decision before the government's deadline. Defendants now take the position that there is no need for the courts to rule on plaintiffs' claims before that deadline, explaining that March 5 "does not mark a watershed of expirations," since "some recipients" have deferred action that will not expire until 2020. Stay Reply 15 & n.6. At the outset of this litigation, however, they told the district court: "we think your suggestion to get to final judgment quickly makes a lot of sense in this case." C.A. Dkt. 13 at 70. And they agreed to produce the administrative record—the "whole record" (5 U.S.C. § 706)—in early October, before dispositive motions were filed. C.A. Dkt. 13 at 69.

Instead of making good on that commitment, defendants produced a record of fourteen hand-picked documents. They have spent the last nine weeks fighting at every level of the federal court system to avoid disclosing to the courts, and ultimately the public, the full record of materials that were before the agency when it made this momentous decision. They now acknowledge that they have collected those materials, and could complete their review and produce the

whole record in short order.[12] Of course, the States agree that any process for evaluating good-faith claims of privilege should proceed in a way that, while expeditious, is orderly and fair to all sides. But defendants have not provided a sufficient basis for this Court to grant a writ of mandamus relieving them entirely from their statutory obligation to produce the "whole record" of their DACA termination decision for appropriate judicial review.

II. CERTIORARI IS NOT WARRANTED

Defendants likewise identify no compelling basis for their alternative suggestion that the Court grant certiorari and review the court of appeals' denial of mandamus. *See* Pet. 17, 34. They do not seriously allege any actual conflict between the courts of appeals that is implicated by the petition. While the underlying subject matter of this case is undoubtedly of great importance, defendants have not established that the issues concerning the administrative record raised in the current petition warrant review by this Court.

Even if the Court were inclined to take up some or all of those questions at some point, this is not the appropriate time. This interlocutory petition presents an exceptionally poor vehicle for review because it arises from the court of appeals' denial of a mandamus petition. This Court would thus review the presented questions through the lens of the deferential mandamus standard, rather than de novo. Meanwhile,

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[12] Defendants have located 6,895 agency documents that potentially fall within the administrative record, as informed by the district court's October 17 order. *See* Appl. Add. 23, 36. A team of 10 attorneys each reviewing 100 documents a day could complete that review in a week. Defendants claim to have the assistance of scores of agency attorneys. *See, e.g.*, Appl. Add. 32 ("more than 40 DOJ attorneys").

developments in the ongoing proceedings below, such as the district court's rulings on the pending motions to dismiss and for a preliminary injunction, could substantially affect the need for, or the context of, review. In addition, any specific questions of privilege are almost totally undeveloped and would more appropriately be reviewed after they are presented to and considered by the lower courts. There is no sound basis for review at this time.

CONCLUSION

The petition for a writ of mandamus or certiorari should be denied.

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No. 17-801

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 17-801

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONERS

Respondents challenge the former Acting Secretary's decision to wind down the policy of immigration enforcement discretion known as DACA. That decision is not judicially reviewable. But even if it were, under settled principles of judicial review of agency action, the decision would be reviewed based on the Acting Secretary's stated reasons and on the record presented, not on pre-decisional documents containing the agency's internal deliberations about that record.

Respondents have not even attempted to make the showing required to warrant departure from those principles. Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). Indeed, after months of litigation, neither the district court nor respondents have ever explained why, to review the discretionary enforcement policy at issue, it is necessary to conduct discovery or add to the administrative record vast amounts of deliberative and other materials on which the Acting Secretary's statement of enforcement policy did not rely and that are immaterial to her decision.

1. The district court clearly erred by mandating sweeping additions to the administrative record and by authorizing intrusive discovery. See Pet. 18-32. It is well settled that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). And it is "not the function of the court to probe the mental processes" of agency decisionmakers. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Rather, the court's review is to be based on the reasons "articulated by the agency itself," and the agency's action "must be upheld, if at all, on th[at] basis." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

It is particularly inappropriate to go beyond the existing record in this case. Respondents challenge not a regulation or an adjudication, but a discretionary statement of policy concerning DHS's enforcement of immigration laws. No statutory provision required any particular procedure, public input, or predicate findings, or directed the Acting Secretary to consider any particular factors, in issuing that policy statement. And her decision rested not on empirical judgments requiring evidence, but instead on the policy and legal concerns set forth in the Rescission Memo itself.

Such a determination of general enforcement policy, like other enforcement decisions, is committed to agency discretion by law and thus not reviewable at all. See 5 U.S.C. 701(a)(2); *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). That is particularly true in the immigration context, where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona* v. *United States*, 567 U.S. 387, 396-

397 (2012). Nothing in the Immigration and Nationality Act cabins that discretion here. To the contrary, 8 U.S.C. 1252(g) *precludes* jurisdiction to review challenges to "'deferred action' decisions and similar discretionary determinations * * * outside the streamlined process that Congress has designed" for litigating an alien's removal. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (*AADC*); see *id.* at 485 & n.9; see also 8 U.S.C. 1252(b)(9).

The Acting Secretary's decision is therefore not judicially reviewable at all. But even if it were, it requires no additional materials to evaluate. Respondents' arguments to the contrary lack merit.

a. Respondents principally defend (*e.g.*, Indiv. Br. in Opp. 14) the district court's orders on the ground that the APA contemplates review upon "the whole record." 5 U.S.C. 706; cf. *Overton Park*, 401 U.S. at 420 (review "is to be based on the full administrative record"). But the "whole record" mandate is a directive to *courts*, not agencies. Prior to the APA's enactment, courts performing "substantial evidence" review sometimes upheld agency action as long as any favorable evidence appeared in the record. In specifying that "the court shall review the whole record," 5 U.S.C. 706, Congress overturned that practice, so that now "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951); see *ibid.* ("This is clearly the significance of the [APA's] requirement * * * that courts consider the whole record."). The "whole record" provision thus does not speak to what materials that an agency must include in the record in the first place—especially here, where the enforcement policy did not require an evidentiary assessment and is

not subject to substantial-evidence review. See *Overton Park*, 401 U.S. at 415.

Respondents protest (*e.g.*, States Br. in Opp. 14-15) that some lower courts have stated that the administrative record must include all materials that were "directly or indirectly considered" by agency decisionmakers. Cf. No. 17A570, slip op. 4 (Breyer, J., dissenting) (Dissent). To the extent respondents understand that articulation to encompass every "email[], letter[], memo[], note[], media item[], opinion[] [or] other material[]" that passed, "however briefly," before the eyes of the Acting Secretary (Pet. App. 42a), it cannot be the law. Just as a court, or an agency conducting a formal hearing, may exclude material as irrelevant, lacking a sufficient foundation, or otherwise inadmissible, an agency can similarly confine the record on which to base informal agency action. Nothing in the APA suggests that an agency compiling a record for informal agency action must include every piece of paper that might touch on the subject, and this Court has made clear that courts are not authorized to add to the APA's requirements. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978). The administrative record in every APA case need not include, for example, every newspaper article read by the decisionmaker. Cf. Indiv. Br. in Opp. 16. Such materials are not "considered" in the relevant sense.[1]

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[1] Respondents also note (Indiv. Br. in Opp. 16) that the record does not include an unsolicited letter supporting DACA from 20 States (including certain respondents) purportedly sent to the President, copying former DHS Secretary John Kelly. But they fail to show that that letter was considered by the Acting Secretary (or her subordinates) in making her decision.

It is the agency's responsibility to develop the record on which its decision will be based, and then, if its decision is challenged, to compile that record and submit it to the court. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Of course, an agency cannot act arbitrarily in so doing. When an agency's decision turns on a factual assessment, for example, the agency may not selectively include evidentiary material that supports its findings while excluding relevant, adverse material. A strong showing of such "bad faith or improper behavior" would permit a district court to look beyond the agency-compiled record. *Overton Park*, 401 U.S. at 420. But respondents have not even attempted to make such a bad-faith showing.

Respondents' concerns that applying these settled principles will "pose[] a serious threat" (Regents Br. in Opp. 16) to judicial review of agency action are misplaced. See Dissent 3-4. There is no need to add to the record to determine whether the Acting Secretary "overlooked relevant factors" or "considered irrelevant [ones]." Regents Br. in Opp. 16. She identified the bases for her decision in the Rescission Memo, to which any judicial review must be directed. See *State Farm*, 463 U.S. at 43; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). No expansion of the record or discovery is needed, or would even be helpful, to determine whether those bases were sufficient to survive deferential arbitrary-and-capricious review.

Nor could expansion of the record possibly be required to determine whether the Acting Secretary's explanation for her decision "r[an] counter to the evidence before [the agency]." States Br. in Opp. 13 (citation omitted). She did not rely on an evidentiary record for

her assessment of the legal and policy issues at stake.[2] And it makes no difference if the Acting Secretary's assessment differed from those of her subordinates. Cf. Indiv. Br. in Opp. 27. The lawfulness of her action is a question that, if reviewable at all, should be determined "objectively" by evaluating the reasons she gave, Dissent 4, not by a show of hands from agency personnel.

Even if the current administrative record were insufficient, that would not "make judicial review toothless." Indiv. Br. in Opp. 15. Rather, if the reviewing court "cannot evaluate the challenged agency action on the basis of the record before it," the action is set aside and the matter is "remand[ed] to the agency for additional investigation or explanation." *Florida Power*, 470 U.S. at 744.

Respondents again rely (*e.g.*, Indiv. Br. in Opp. 14-15) on informal guidance circulated by DOJ's Environment and Natural Resources Division to certain client agencies on compiling an administrative record. But as the government has explained (Pet. 24-25), that non-binding guidance says nothing about what a *court* may order an agency to produce. And because an agency bears the risk of producing an insufficient record, see Pet. App. 17a-18a (Watford, J., dissenting), the agency may reasonably choose to include more than the law requires.

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[2] Although respondents note (Regents Br. in Opp. 17) that the Attorney General suggested in a press statement that rescinding DACA would "reverse the loss of hundreds of thousands of jobs to illegal aliens and reduce crime, violence, and terrorism," the Acting Secretary did not base her decision on any such factual judgments, as respondents acknowledge (*ibid.*). See *Sierra Club* v. *Costle*, 657 F.2d 298, 407-408 (D.C. Cir. 1981) (upholding agency's exclusion of materials upon which agency "ma[de] no effort to base [its] rule").

Respondents offer no persuasive defense of the district court's orders requiring all White House officials who consulted with the Acting Secretary about DACA, including the President or Vice President, to "scour" their files for "documents for inclusion in the administrative record." Pet. App. 43a. Respondents instead complain (*e.g.*, States Br. in Opp. 25-26) that the government has not explained in sufficient detail why that requirement is burdensome. But this Court in *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), concluded that the propriety of similarly broad document demands could be evaluated based simply on the face of plaintiffs' requests, and specifically held that the White House was not required to "bear the onus of critiquing th[ose] unacceptable discovery requests line by line" before the government's objections were addressed. *Id.* at 388. The district court's orders here requiring White House officials to search for and review "responsive" documents impose substantially the same burden.

Respondents claim (States Br. in Opp. 29) they are entitled to discovery on their "non-APA claims," but as explained (Pet. 23), constitutional challenges to agency action are governed by the APA just like any other challenge. See 5 U.S.C. 706(2)(B) (authorizing judicial review of agency action allegedly "contrary to constitutional right, power, privilege, or immunity"). And, in any event, respondents have not remotely satisfied the "rigorous standard" for seeking discovery in aid of their discriminatory-enforcement claims. *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996); *AADC*, 525 U.S. at 489-491.

b. Respondents wrongly defend the ordered inclusion of deliberative materials by attempting to distinguish (*e.g.*, Regents Br. in Opp. 18) between depositions

probing the decisionmaking process and the compelled production of documents memorializing agency deliberations.[3] As the D.C. Circuit has repeatedly recognized, however, the compelled disclosure of deliberative materials is no less intrusive. See Pet. 27-28 & n.6; *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 28, 44-45 (en banc) (plurality opinion), cert. denied, 479 U.S. 923 (1986); *Checkosky* v. *SEC*, 23 F.3d 452, 489 (1994) (opinion of Randolph, J.); *Norris & Hirshberg, Inc.* v. *SEC*, 163 F.2d 689, 693 (1947) ("[I]nternal memoranda made during the decisional process * * * are never included in a record."), cert. denied, 333 U.S. 867 (1948).

Respondents urge this Court to ignore these decisions because they were articulated in the context of formal adjudications (*Morgan*) or multi-member agencies (*San Luis Obispo*). *E.g.*, States Br. in Opp. 19, 22-23; cf. Dissent 5-6. But an agency's need for internal, nonpublic deliberation is no less compelling in informal decisionmaking or for single-headed agencies. Indeed, this Court has described the "importance of * * * confidentiality" for "communications between high Government officials and those who advise and assist them" as "too plain to require further discussion." *United States* v. *Nixon*, 418 U.S. 683, 705 (1974); see, *e.g.*, *National Sec. Archive* v. *CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) ("[I]f agencies were to operate in a fishbowl, the frank

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[3] Justice Breyer suggested that, "[a]t least facially," the categories of documents implicated by the district court's orders "do not seem to involve 'inquiry into the mental processes' of the decisionmaker at all." Dissent 5. But neither the district court nor respondents have offered any reason for gathering every internal "email[]," "memo[]," and "opinion[]" *except* to inquire into the content of the agency's internal deliberations.

exchange of ideas and opinions would cease.") (citation omitted). And the same interests are at stake whether the agency's deliberations are reflected in contemporaneous documents or after-the-fact testimony.

Respondents assert (States Br. in Opp. 22) that if an agency were not required to submit a detailed log documenting its deliberative materials, the agency would become the "sole arbiter" of whether a document is privileged. But internal agency deliberations are not matters that the APA makes part of the record, yet grudgingly protects from disclosure. Instead, as respondents recognize, the "record" is the underlying, pertinent set of materials that agency officials are "privately deliberating *about*." *Id.* at 23 n.11. Because the subjective motivations or opinions of agency employees are irrelevant to judicial review, pre-decisional deliberative materials are "immaterial as a matter of law." *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Just as an agency need not log documents it has not considered in its decisionmaking process, so too it need not log other documents legally outside the record.

c. Respondents fare no better in defending the district court's summary and clearly erroneous treatment of the government's invocations of privilege.

Respondents fault (*e.g.*, Indiv. Br. in Opp. 25) the government for not advancing specific arguments about each of the privileged documents ordered disclosed. But that is our point. After affording only two days' notice to prepare a privilege log, the district court ordered the public disclosure of dozens of privileged documents without permitting any briefing or argument. The government's petition here does not simply seek review of the district court's individual privilege errors. Rather, the court's procedures and its resulting errors

are emblematic of its dramatic departure from ordinary principles of judicial review.[4]

Respondents apparently concede that a memorandum from the White House Counsel to the President would be protected by executive privilege, and defend the district court's ruling on the theory that "the author [and] recipient" must not have been readily discernible. Indiv. Br. in Opp. 26. That is wrong, and if the Court wishes to confirm as much, it may call for the district court's *in camera* record. The district court's summary overruling of executive privilege simply underscores its inattention to the substantial separation-of-powers concerns raised here. See *Cheney*, 542 U.S. at 381-382.

Respondents also strain to defend the court's categorical overruling of attorney-client privilege by asserting that "a litigant may not use the attorney-client privilege as both a sword and a shield." States Br. in Opp. 27. But the Acting Secretary has not withheld any materials on which she relied in her decision: The administrative record includes all such materials, including the Attorney General's letter and relevant judicial decisions. If that record were somehow insufficient, the decision may be set aside. But there is no justification for the court's desire to review internal "legal research," Pet. App. 38a, much less for imposing a blanket waiver of privilege.

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[4] Respondents similarly protest (*e.g.*, States Br. in Opp. 29) that the government has not presented with greater particularity its objections to document discovery and depositions. But discovery is altogether out of place in these APA actions, and the government has repeatedly pressed that threshold objection. See Stay Reply 11-13. Individual challenges to particular depositions or document demands are not necessary to preserve that objection.

2. The remaining prerequisites for mandamus are also satisfied.

As explained (Pet. 18), the government has no other adequate means of obtaining relief. Respondents note that legal issues concerning "composition of the administrative record" or "privilege" would not become moot and could still be reviewed on appeal from final judgment (States Br. in Opp. 10). But by that point, separation-of-powers principles will have been further undermined; substantial resources will have been expended to search White House and agency files and review thousands of documents for privilege; numerous senior officials will have been subjected to deposition; and privileged documents will have been irreversibly disclosed, see Stay Appl. 25-31. Mandamus exists in order to confine a district court to its lawful authority *before* final judgment is reached. See Pet. 32-33. As Judge Watford recognized, this is a "classic case [for] mandamus relief." Pet. App. 20a.

Respondents urge (Indiv. Br. in Opp. 35) that they should be given a "fair opportunity to test the legality" of the Acting Secretary's decision. If her exercise of enforcement discretion were ultimately held reviewable, respondents should indeed have that opportunity. But the requested mandamus relief would simply mean that these cases would be litigated under the APA on the record presented by the agency. Respondents have consistently maintained that they are entitled to prevail even without additions to the record or discovery, as their briefing in this Court makes clear. If this Court issues a writ of mandamus, nothing will prevent the district court from addressing respondents' arguments and from resolving the litigation on an appropriately expedited basis.

* * * * *

For the foregoing reasons and those stated in the petition, this Court should issue a writ of mandamus or, in the alternative, treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decision.

Respectfully submitted.

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DECEMBER 2017

No. 17-801

IN THE

Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.,

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SCHOLARS AS *AMICI CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors and legal scholars who teach, write, and study matters of constitutional, administrative, and immigration law. They have extensively studied issues related to the privilege assertions made in connection with actions brought under the Administrative Procedure Act. As legal scholars and educators of the next generation of lawyers, *Amici* have an interest in ensuring that the purpose and intent of the Administrative Procedure Act to provide review of Executive Branch action are not undermined by an overly broad assertion of executive privilege.

Amici are the following scholars:[2]

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici* submitting this brief and their counsel represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amici* paid for or made a monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.2, *Amici* notified Counsel of Record for all parties of their intention to file this brief. All parties consent to the filing of this brief.

[2] *Amici* join this brief as individuals. Their institutional affiliations are noted for informational purposes only and do not indicate endorsement by institutional employers of positions advocated.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of the Administrative Procedure Act ("APA" or the "Act") is clear-cut: to serve as a necessary check against unbridled decision-making powers of the Executive Branch. The APA ensures independent judicial review of agency actions and, in so doing, protects the public from arbitrary, capricious, and unconstitutional agency decisions. *See* 5 U.S.C. § 706.

For the APA to serve its important intended purposes, federal agencies cannot be allowed to easily avoid meaningful review by concealing materials evidencing their decision-making process under the

guise of asserted privileges.[3] To ensure effective judicial review, the APA requires courts to examine agency decisions on the basis of "the whole [administrative] record," which consists of "the full administrative record that was before the [agency] at the time [it] made [its] decision." 5 U.S.C. § 706; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A complete administrative record enables courts to evaluate whether the agency "relied on factors which Congress has not intended it to consider," "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency," among other things. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Unwarranted assertions of privilege, as Petitioners—the United States, President Donald J. Trump, Acting Secretary of the Department of Homeland Security ("DHS") Elaine C. Duke, and Attorney General Jefferson B. Sessions, III (collectively, Petitioners)—appear to have done here, would undermine the ability of courts to review executive action by omitting critical documents from the administrative record.

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[3] This brief specifically addresses Petitioners' assertions of the deliberative process and presidential communications privilege and does not address their assertions of the attorney-client privilege over certain materials they sought to withhold from the administrative record. This, however, does not constitute *Amici's* agreement with Petitioners' other privilege claims, including assertions of the attorney-client privilege.

Attempts to shield documents from judicial review by improperly asserting the deliberative process privilege can deprive the court of the full administrative record mandated by the APA. This privilege, which serves to foster open communications between government officials, should not be used as a means to circumvent agencies' obligations to provide courts materials necessary to evaluate potentially unlawful agency actions. Thus, to the extent applicable in APA actions, the deliberative process privilege is properly viewed as one qualified in nature, which can be overcome by an adequate showing of need. *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Likewise, assertions of the presidential communications privilege are qualified in nature. The privilege extends only to communications involving the President, White House advisers, and their immediate staff that relate to the President's decision-making process. *United States v. Nixon*, 418 U.S. 683, 708 (1974). The purpose of this circumscribed privilege is to provide a degree of protection to the President's communications with his advisors to encourage candid, objective, and sometimes blunt or harsh discussions. *See id.* Given this limited purpose, the presidential communications privilege does not extend to communications the President did not participate in or to documents or communications that the President did not solicit or receive. *In re Sealed Case*, 121 F.3d 729, 743, 752 (D.C. Cir. 1997). Without evidence that the President was, in fact, part of the subject communications, or that the President solicited or received documents, this privilege does not apply. And even where it otherwise applies, it remains a

qualified privilege. A court must still examine whether the need for disclosure in the APA action outweighs the need for confidentiality in the particular context.

Amici file this brief to underscore that Petitioners' deliberative process privilege and presidential communication privilege assertions are unprecedented and unfounded. If accepted, these claims would enfeeble judicial review in APA cases and undermine the judiciary's ability to serve as a meaningful check on arbitrary or illegal Executive Action.

Amici urge the Court to deny this petition. The District Court's rulings on the asserted privileges do not represent such an abuse of power that would warrant this Court's extraordinary intervention in this discovery matter, which would disrupt the proceedings below and forestall consideration of the merits of this important case. Here, the District Court properly recognized the qualified nature of these privileges and the limits on their applications. Moreover, the petition does not raise any novel question of law or circuit split on recurring legal questions.

Accordingly, the Court should deny both the petition for a writ of mandamus and the alternative request for a writ of certiorari.

ARGUMENT

I. The Deliberative Process Privilege Is A Limited Privilege That Does Not Override The Requirements Of The Administrative Procedure Act

A. Broad assertions of the deliberative process privilege undermine the intent and purpose of the Administrative Procedure Act.

The APA allows for the judicial review of all final agency action to ensure that agency decisions are not "arbitrary, capricious ... or otherwise not in accordance with [the] law." 5 U.S.C. § 706(2)(A). The APA also makes actionable all final agency action that results in harm to individuals. *Id.* § 702. Judicial review of agency decisionmaking cannot be effective, however, when the agency provides a deficient administrative record. In fact, the APA provides that courts are required to review "the whole [administrative] record." *Id.* As the Supreme Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), the "whole record" means "the full administrative record that was before the [agency] at the time [it] made [its] decision." In other words, the administrative record consists of all materials "considered by agency decision-makers," *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added), not just those which support or form the basis for the agency's ultimate decision. *See also, e.g., Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] complete administrative record should include all materials that might

have influenced the agency's decision, and not merely those on which the agency relied in its final decision.") (citation and quotations omitted).

Here, Petitioners argue that materials should be excluded from the "whole record," because they implicate the Executive's deliberations. Of course, pursuant to the APA, it is part and parcel of the review for a court to understand the nature and basis of an agency's decision.

The deliberative process privilege is most commonly asserted in Freedom of Information Act ("FOIA") litigation, where Congress by statute (5 U.S.C. § 552(b)(5)) has provided an exemption for deliberative materials from disclosure to a FOIA request.[4] No similar exception is provided for by the APA. Indeed, broad assertions of such a privilege in cases arising under the APA would work to preclude judicial review of agency decisionmaking.[5] As the District Court recognized here, "[s]ince enactment of the Administrative Procedure Act, this Court has not approved withholding of otherwise legitimate contents

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[4] *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 848 (1990) (listing cases).

[5] Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 St. Louis U. L.J. 349, 386 (2009); ("[T]here is mounting evidence that the Executive Branch is using the deliberative process privilege ... arguably as a subterfuge to cover up decisions that are being made largely on political grounds...."); Wetlaufer, *supra* note 4, at 863.

of an administrative record based on a "deliberative" privilege ..." in APA cases. District Ct. Stay Opp. 3.

In contexts where it is recognized, the deliberative process privilege is a limited privilege that can allow the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The purpose of the privilege is to allow for frank and open discussions between high-ranking government officials regarding their policymaking deliberations. The limited privilege, however, does not protect "material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737.

Additionally, to rely on the deliberative process privilege, a government agency must establish that the material in question is both predecisional and deliberative. *Id.* A "predecisional" document is one prepared "to assist an agency decisionmaker in arriving at his decision," *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975), and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866

(D.C. Cir. 1980). Predecisional materials are privileged only "to the extent that they reveal the mental processes of decisionmakers," or are part of decisionmakers' *deliberative* process, for example, their "preliminary opinions and explorations." *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (citation omitted). But, even where material is predecisional and deliberative, the privilege remains qualified and can be overcome by a sufficient showing of need. *In re Sealed Case*, 121 F.3d at 284; *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

An overly generous application of a deliberative process privilege in the APA context cannot be squared with *Overton Park*'s "full administrative record" requirement. Although *Overton Park* did not involve judicial review of a regulation or adjudicatory order, the case makes clear that an agency cannot unilaterally decide to withhold documents from an administrative record simply based on its say so. Such unbridled agency discretion would circumvent the judicial review allowed under the APA, and hinder courts' ability to fully "consider whether [an agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). To allow such manipulation of the record, would impair a court's ability to "review an agency's action fairly." *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Rather than seek material that would "probe the mental processes of [agency]" decisionmakers, as was the concern in *United States v. Morgan*, 313 U.S. 409,

422 (1941), the District Court here simply ordered Petitioners to complete an otherwise deficient administrative record. As Justice Breyer noted in his dissent to Petitioners' application for a stay, "probing a decisionmaker's subjective mental reasoning ... is distinct from the ordinary judicial task of evaluating whether the decision itself was objectively valid, considering all of the materials before the decisionmaker at the time he made the decision." Stay Decision at 4-5 (Breyer, J. dissenting).

Accordingly, requiring an agency to provide the complete administrative record for review simply requires that agency to produce materials relevant to its decision that were already in existence when the decision was made. And contrary to Petitioners' assertion, they cannot exclude every predecisional agency document from review without preparing a privilege log. The District Court here acknowledged as much when it directed that Petitioners could withhold material from the publicly filed record "based on deliberative-process, or any other privilege" subject to a requirement that they log the document, assert any claimed privilege, and make the document available for in camera review by the court. Pet. App. 43a. Petitioners' position "would convert the deliberative process privilege from a qualified privilege to a categorical exclusion from the record..." State Opp. 37.

B. Shielding the internal government deliberations undermines the public's interest in honest and effective government.

Even where recognized, courts retain the authority to deny assertions of the deliberative process privilege where shielding of internal government deliberations does not serve "the public's interest in honest, effective government." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995); *see also In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979) (shielding evidence of governmental wrongdoing does not enhance the effectiveness of government); *see also Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401-03 (E.D. Mich. 1965) ("the real public interest under such circumstances is not the agency's interest in its administration but the citizen's interest in due process"), *aff'd*, 377 F.2d 496 (6th Cir. 1967).

For example, the court in *Franklin* rejected attempts by the Office of the Comptroller of the Currency to shield from review reports it authored related to a bank's collapse. In overruling the assertion of deliberative privilege, the court held that the reports requested provided a "unique and objective contemporaneous chronicle" of the bank's decline and that "no satisfactory substitute exist[ed]" for the public's benefit. *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 586. And in *Texaco*, the court similarly held that the public's interest in understanding the reasoning behind a state agency's decision to regulate the profit margins of petroleum wholesalers overrode

the agency's objection to produce documents containing evidence of its deliberations over the issue. 60 F.3d at 885.

Here, Respondents allege that the implementation of the DHS Memorandum and DACA's rescission without a clearly articulated basis was arbitrary and capricious. State Opp. 7, 9. Petitioners characterized their decision to terminate the program as a "discretionary enforcement policy decision," but absent from the record is any analysis of the purported litigation risk or any cost-benefit analysis of DACA's benefits to program recipients, or the potential harms to the program's 800,000 beneficiaries. *See generally id.* at 3-4, 9. Without evidence on which DHS relied in making this decision, the public is deprived of well-reasoned government decisionmaking. The public does not have a "satisfactory substitute" from which it can even begin to understand DHS's reasoning. *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 586. If agencies could take such unreviewable action whenever it saw a litigation risk, however large or small, without providing evidence of the factors that went into its decision, the public's faith in effective government would surely wane.

In this case, the District Court considered the relevant factors and exercised its authority to balance the public's need for the materials against the qualified privilege. Its ruling was not such an extraordinary abuse of power that could warrant this Court's exercise of its mandamus power.

II. The Presidential Communications Privilege Applies Only In Limited Circumstances

The presidential communications privilege is a qualified privilege for communications that involve the President and those assisting him in in his decision making process. *See Nixon*, 418 U.S. at 708 (recognizing the privilege's necessity "for [the] protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking"). The purpose of the privilege is to "guarantee the candor of presidential advisers and to provide [a] President and those ... assist[ing] him ...[with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express privately." *In re Sealed Case*, 121 F.3d at 743 (quoting *U.S. v. Nixon*, 418 U.S. at 708) (recognizing the qualified nature of the presidential communication privilege and stating that "neither the doctrine of separation of powers, nor the need for confidentiality ... without more, can sustain an absolute, unqualified Presidential privilege of immunity...."); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (the privilege is "rooted in the President's 'need for confidentiality in the communications of his office' ...in order to effectively and faithfully carry out his ... duties and 'to protect the effectiveness of the executive decision-making process'"); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't. of Justice*, 658 F. Supp. 2d 217, 235 (D.D.C. 2009).

Recognizing that potential for abuse, courts have construed the presidential communications privilege

narrowly only to cover communications and documents that reflect the President's decisionmaking and deliberations that the President believes should remain confidential. *Nixon*, 418 U.S. at 712-13 (allowing the privilege "to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts"); *In re Sealed Case*, 121 F.3d at 751-52 ("[t]he presidential communications privilege should never serve as a means of shielding information regarding government operations that do not call ultimately for direct decisionmaking by the President"); *see also Judicial Watch, Inc.*, 365 F.3d at 1114-15 (refusing to extend the presidential communications privilege to officials within the Justice Department that were not solicited or received by the President or his immediate White House advisors).

In keeping with this narrow construction of the privilege, courts have consistently held that the presidential communications privilege only extends to the President, immediate White House advisers, and their staff. *In re Sealed Case*, 121 F.3d at 752 ("[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege"); *Judicial Watch, Inc.*, 365 F.3d at 1115 (the privilege applies to "[a] President and those who assist him..."); *Ctr. For Biological Diversity v. OMB*, No. C07-04997, 2009 WL 1246690, *8 (N.D.Cal. May 5, 2009) (same). In particular, the presidential communications privilege does not apply to executive branch officials outside of the White House. It does not apply

to cabinet officials, executive agency heads, or executive agency staff. *See In re Sealed Case*, 121 F.3d at 752; *see also Judicial Watch*, 365 F.3d at 1121-22, 1123 (the presidential communications privilege applies only to documents "solicited and received" by the President or his immediate advisers in the Office of the President and refusing to extend the privilege to documents that make their way to the Office of the President); *Ctr. For Effective Gov't v. U.S. Dep't. of State*, 7 F. Supp. 3d 16, 26-27 (D.D.C. 2013) (recognizing that the presidential communications privilege would not extend to communications that do not reach the President or his closest advisers because they are unlike to have any relevance in the President's decisionmaking).

Even where it does apply, a party can overcome the qualified presidential communications privilege if the court finds that the party made an adequate demonstration of need. *See Nixon*, 418 U.S. at 713; *see also In re Sealed Case*, 121 F.3d at 745 (stating that "the privilege is qualified, not absolute and can be overcome by an adequate showing of need"); *Judicial Watch, Inc.*, 365 F.3d at 1113 (same). Further, the presidential communications privilege can be waived by conduct that reveals the nature of the communication. *See Ctr. For Effective Gov't*, 7 F. Supp. 3d at 25-26 (holding that the wide dissemination of a Presidential directive and its "widely publicized" nature undermined the directive's confidential nature).

Moreover, even where the President was involved in the ultimate decision, an agency seeking to withhold materials based on the presidential communications privilege must demonstrate that the documents

it seeks to withhold were in fact provided to the President or solicited by the President as part of his decisionmaking process. Instructive here is *Judicial Watch, Inc.* At issue in *Judicial Watch, Inc.* was a Freedom of Information Act ("FOIA") request seeking internal DOJ documents regarding its pardon recommendations to the President. *See* 365 F.3d at 1109-10. In an attempt to withhold the documents, the DOJ argued that the presidential communications privilege applied to the internal DOJ documents that did not actually accompany the DOJ's pardon recommendations to the President because they were prepared in the course of advising the President. *See id.*

The D.C. Circuit rejected the DOJ's argument and refused to extend presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President. *See Judicial Watch, Inc.*, 365 F.3d at 1114-15. In so holding, the court reasoned that extending the presidential communications privilege broadly was not only inconsistent with well-established precedent, it would also significantly dilute the intended purpose of protecting communications intended for the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case*, "*pose a significant risk of expanding to a large swath of the executive*

> *branch a privilege that is bottomed on a recognition of the unique role of the President.*"

See Judicial Watch, Inc., 365 F.3d at 1121 (emphasis added) (quoting *In re Sealed Case*, 121 F.3d at 752). Accordingly, the Court limited its application to communications "solicited and received" by the President or the Office of the President. *See id.* at 1114-15, 1123.

The presidential communications privilege does not apply to communications and documents in Petitioners' administrative record if the President did not solicit or receive those communications and documents.

CONCLUSION

Amici submit that acceptance of Petitioners' assertions of the deliberative process and presidential communication privileges would weaken judicial review in APA cases and undermine the judiciary's ability to serve as a meaningful check on arbitrary, capricious, and illegal Executive actions.

Accordingly, the Court should deny the petition for a writ of mandamus and the alternative request for a writ of certiorari.

Respectfully submitted,

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No. 17-801

IN THE

Supreme Court of the United States

In re: United States of America, *et al.*,

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of California

BRIEF AMICI CURIAE OF NATURAL RESOURCES DEFENSE COUNCIL, INC., AND PUBLIC CITIZEN, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

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INTERESTS OF AMICI CURIAE

Amici curiae Natural Resources Defense Council, Inc. (NRDC), and Public Citizen, Inc. (Public Citizen), submit this brief to assist the Court in understanding how a narrowing construction of the Administrative Procedure Act's "whole record" judicial-review requirement would impair the judiciary's ability to check federal agencies' abuses of authority.[1]

NRDC is a nonprofit advocacy group that works to protect health and the environment. Since its founding in 1970, NRDC has litigated hundreds of cases in which the court reviewed agency action based on an administrative record. NRDC has prosecuted some of these cases against federal agencies; others it has litigated alongside those agencies, defending their actions. In both contexts, the integrity of the judicial review process depends on the court and all parties having access to an administrative record that fully, fairly, and accurately reflects the agency's proceedings.

Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its

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[1] All parties have consented in writing to the filing of this brief. Under the circumstances, it was not possible to give ten days' notice pursuant to Rule 37.2. However, counsel for amici curiae provided notice to all parties on December 11, 2017, the first business day after this Court's order directing responses to the petition for writ of mandamus to be filed by December 13, 2017.

This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief.

nationwide membership before Congress, administrative agencies, and the courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes. Since its founding in 1971, Public Citizen has litigated numerous cases in which the court reviewed agency action based on an administrative record. Like NRDC, Public Citizen has done so both as the plaintiff or petitioner, challenging agency action, and as an amicus, supporting agency actions. Public Citizen thus has a strong interest in and is well suited to speak to the issue before the Court in this case.

SUMMARY OF THE ARGUMENT

Petitioners claim that federal courts should review informal agency action based not on the whole record of the agency action, 5 U.S.C. § 706, but on a partial, and potentially sanitized, record. Their approach would disregard the text and structure of the Administrative Procedure Act (APA), and would eviscerate this Court's long-settled precedent that a reviewing court must consider not only record material that supports an agency, but also record material that undercuts it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

The administrative-record limitations for which Petitioners advocate would impair judicial review of actions taken by almost every federal agency, under myriad statutes. That, in turn, would transfer power from the judicial to the executive branch, impeding litigation to hold agencies accountable by both the beneficiaries of regulation and those who are regulated. The highly politicized context of this case

should not obscure these implications of Petitioners' approach.

1. Section 10 of the APA generally provides for judicial review of "agency action" on "the whole record." 5 U.S.C. § 706. Nothing in this language or in the statute's structure or history suggests that a federal agency may unilaterally exclude from this record documents that it does not wish to include—even though the documents were before the agency, considered by agency staff, and available to the agency's ultimate decisionmaker when she made her decision. Judicial review on the "whole record" of the "agency action," 5 U.S.C. § 706, necessarily requires the *whole* record.

The nature of the reviewing court's task explains why Congress specified whole-record review. The APA's arbitrary-or-capricious standard requires a court to assess whether the agency based its decision on the relevant factors, explained its decision in a way that comports with "the evidence before [it]," and offered a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). To effectively undertake these tasks, a reviewing court must have access to the entire record of the agency's action, not just materials that the agency's ultimate decisionmaker directly reviewed and that are otherwise public.

This Court long ago rejected the conceit that an agency may present for judicial review just those documents that the agency wants the court to consider. *See Universal Camera*, 340 U.S. at 487-88.

The reason is self-evident: "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. "The fact that defendants presented documents that seemed to support the rationality of their actions does not mean that the same conclusion would have been reached if the Court had been aware of other information that was before the agency." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). Judicial review on "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Consistent with these principles, courts of appeals have held that the "whole record" of an informal "agency action," 5 U.S.C. § 706, encompasses information and documents that were before the agency when it made its decision, whether those documents were considered directly by the ultimate decisionmaker, or indirectly through agency staff. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Petitioners fail to identify any substantial disruption of agency prerogatives resulting from these longstanding precedents. To be sure, they complain about the *deadline* the district court here imposed for production of the administrative record, but a deadline grievance in a particular case can hardly justify taking a judicial knife to the APA's "whole record" standard.

Although plain enough on its own, the relevant statutory language (the "whole record" of the "agency action") can be most clearly understood "with a view to [its] place in the overall statutory scheme." *Davis v.*

Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989). Effective judicial review under the APA depends upon an administrative record sufficient to allow a court to apply the standards this Court announced in *Motor Vehicle Manufacturers*. 463 U.S. at 42-43. Those standards require the reviewing court to have access to more than just the already-public documents directly considered by the agency's head; to do its job, the court must have access to the full record of the agency's proceeding. A "contrary approach" would "render judicial review generally meaningless" and contravene courts' duty to "ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted).

2. Although Petitioners contend that reviewing courts have no business examining their deliberations, judicial review of agency action under the APA requires a court to look beyond the agency's own presentation. *See Motor Vehicle Mfrs.*, 463 U.S. at 42-43; *Universal Camera*, 340 U.S. at 488. That Congress required courts to look to what the agency *actually* considered and had before it is unsurprising, for when Congress enacted the APA, courts had not yet even recognized a deliberative-process privilege. The courts' subsequent recognition of such a privilege, *see Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944-47 (Ct. Cl. 1958), does not negate Congress's decision to require agency administrative records sufficient to allow meaningful judicial review.

There of course may be circumstances in which deliberative materials need not be disclosed. But the deliberative-process privilege is a *qualified* protection, intended to improve "the quality of agency decisions."

FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984); *see, e.g.*, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 439, 442-43 (S.D.N.Y. 2009). There are competing concerns, manifest in the APA, "in opening for scrutiny the government's decision making process," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), and "ensuring the rationality and fairness" of agency decisions, *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

Given the qualified nature of the deliberative-process privilege, it has long been recognized that "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Warner Commc'ns*, 742 F.2d at 1161; *see Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977); *cf. United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir. 1976) (applying a balancing test to evaluate a deliberative process claim in discovery). Nothing in the APA's "whole record" review standard hints that Congress intended to exempt from this balancing all deliberative documents that would otherwise properly be part of the agency record.

Thus, if an agency wishes to exclude documents from the record on judicial review as deliberative-process privileged, the agency must show why its interest in keeping specific documents nonpublic outweighs "society's interest in the accuracy and integrity of factfinding, and the public's interest in honest, effective government." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). Absent such a showing, the documents should

remain part of the "whole record" before the reviewing court.

ARGUMENT

I. Judicial review under the Administrative Procedure Act requires courts to have access to the "whole record" of the agency action

The APA's arbitrary-or-capricious standard, *see* 5 U.S.C. § 706(2)(A), requires the court to decide, among other things, whether the agency based its decision on the relevant factors, explained its decision in a way that "runs counter to the evidence before [it]," or failed to offer a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 42-43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). The court must also determine whether the agency considered and responded to significant comments received from the public. *See* 5 U.S.C. § 553(c); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Courts' "searching and careful" review of these issues, *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), must generally be conducted on "the whole record or those parts of it cited by a party," 5 U.S.C. § 706.

Effective judicial review is critical to the equilibrium of power among the three branches of government, for it depends on the courts being able to do their job. Congress passed the APA "against a background of rapid expansion of the administrative process," *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950), "to ensure that agencies follow constraints even as they exercise their powers," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and in the judgment). Congress "subjected [agency] decisions to

judicial review" for the same reason. *Id.* "[I]t would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the [APA] warrant, to give effect to its remedial purposes." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

A court that does not have the whole record obviously cannot "carefully review[] the record and satisfy[] [itself] that the agency has made a reasoned decision based on [the agency's] evaluation of the [evidence]." *Marsh*, 490 U.S. at 378. For example, a court cannot assess whether an agency decision "runs counter to the evidence," *Motor Vehicle Mfrs.*, 463 U.S. at 43, without having *all* the evidence. And, without knowing what factors the agency actually considered, a court cannot evaluate whether the agency based its decision on the relevant factors, or instead on impermissible ones. *See Nat. Res. Def. Council v. U.S. EPA*, 658 F.3d 200, 216-18 (2d Cir. 2011) (finding an agency decision arbitrary where it failed to explain how it effectuated a statutory factor); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248-49 (D.C. Cir. 1971) (holding that an agency decision based on political pressure would be impermissible); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011) (similar); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 763, 768-69 (9th Cir. 2007) (affirming holding that an agency relied on factors that Congress had not intended it to consider).

To fairly and accurately do its job, a reviewing court should therefore "have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *see also Dopico*, 687 F.2d at 654. Anything less

would allow an agency to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). An "incomplete record" is little more than a "'fictional account of the actual decisionmaking process.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1998) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)). Congress specified "whole record" review of agency action to prevent such fictions. *See* S. Rep. No. 79-752, at 214 (1945).

That the record of the agency's actual decisional process should be before the reviewing court is what *Camp v. Pitts* meant in stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[2] 411 U.S. 138, 142 (1973) (per curiam). The record "already in existence," *id.*, is the record of the agency's actual proceeding, regardless of whether the agency includes that material in the "record" it lodges with the court. *Dopico*, 687 F.2d at 654; *accord Thompson*, 885 F.2d at 556 (stating that the administrative record is "not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record" (citation omitted)). If the agency does not actually provide that "whole record," 5 U.S.C. § 706, then the

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[2] A court need not find bad faith to determine that the record is incomplete. *Contra* Pet. 20. When, as here, an agency misapprehends what an administrative record must include, the agency's own explanation of what it excluded may suffice to establish the record's incompleteness.

reviewing court may order the record completed. *See Dopico*, 687 F.2d at 654; *Pub. Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982) (Kennedy, J.).

To be sure, other than in formal proceedings, *see* 5 U.S.C. § 556(e), the specific documents that "constitute[] . . . the administrative record may be very unclear." *Suffolk Cty.*, 562 F.2d at 1384 n.9. In principle, the record includes the agency's "informational base" when it made its decision. *Dopico*, 687 F.2d at 654. That base encompasses "everything that was before the agency pertaining to the merits," *Portland Audubon Soc'y*, 984 F.2d at 1548, or more specifically, "all documents and materials directly or indirectly considered by the agency," *Bar MK Ranches*, 994 F.2d at 739.

Informal agency proceedings, such as most agency rulemakings, often take years to complete. Dozens of agency staff, trained in a range of disciplines, may work on a matter. Trade associations, academics, advocacy groups, and private citizens may submit substantial comments that the agency must investigate. At the end of this process, an administrative record may encompass public

comments;[3] draft reports;[4] briefing books;[5] internal analyses;[6] staff recommendations;[7] communications and concerns of agency staff;[8] the views of sister agencies;[9] economic studies;[10] and internal or nonpublic scientific evaluations.[11] The resulting record may seem like "a melange of written

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[3] *See, e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1473-74 (9th Cir. 1994).

[4] *See, e.g.*, *Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990); *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996).

[5] *See Nat. Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

[6] *See, e.g.*, *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1156, 1162 (9th Cir. 1980).

[7] *Suffolk Cty.*, 562 F.2d at 1385; *Bersani v. U.S. EPA*, 674 F. Supp. 405, 410 (N.D.N.Y. 1987).

[8] *See, e.g.*, *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1136 (9th Cir. 2016); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1264-65 (10th Cir. 2011); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1130 (D. Or. 2002).

[9] *See Pritzker*, 828 F.3d at 1136-37 (referring to concern voiced by Marine Mammal Commission).

[10] *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801-02, 807 (9th Cir. 2005); *Hughes River Watershed Conservancy v. U.S. Forest Serv.*, 81 F.3d 437, 446-47 (4th Cir. 1996).

[11] *See, e.g.*, *Pritzker*, 828 F.3d at 1136-40; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 479, 497-98 (9th Cir. 2011); *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 358, 360 (8th Cir. 1984); *Asarco*, 616 F.2d at 1162; *Tenn. Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1017, 1019-20 (W.D. Tenn. 1980).

statements, letters, reports, and similar materials received outside the bounds of the oral hearing." *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). While such records are not always tidy, they have the advantage of reflecting the agency's actual, if informal, proceedings.[12]

Given the scope and complexity of regulatory agencies' work, informal rulemaking records sometimes span tens of thousands of pages or more.[13]

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[12] To the extent that Petitioners suggest that the administrative record in informal agency rulemakings and adjudications includes only materials that would be included in the record of a *formal* APA rulemaking or adjudication, *see* Pet. 28-29; 5 U.S.C. § 556(e), they misunderstand the APA's statutory scheme. Formal APA proceedings are subject to requirements—including a prohibition on *ex parte* communications, 5 U.S.C. § 557(d)(1)(A); a right to call and cross-examine witnesses, *id.* § 556(d); and transcribed hearings, *id.* § 556(e)—that do not apply to informal proceedings. Consistent with these trial-like procedures, the APA provides that the "record" for formal proceedings includes only the transcript, exhibits, and materials "filed in the proceeding." *Id.* Informal proceedings are subject to none of these constraints, and Congress chose not to apply the same definition of the record to them, either. *See id.* §§ 553(c), 556(e).

[13] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016); *Texas v. EPA*, 499 F.2d 289, 297 (5th Cir. 1974); *Hyatt v. U.S. Patent & Trademark Office*, 146 F. Supp. 3d 771, 774 (E.D. Va. 2015); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1044 (N.D. Cal. 2015); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 09-00037, 2011 WL 7701433, at *3 n.2 (D.N.M. Aug. 3, 2011); *Phippsburg Shellfish Conservation Comm'n v. U.S. Army Corps of Eng'rs*, 800 F. Supp. 2d 312, 314 n.1 (D. Me. 2011); *Bonnichsen*, 217 F. Supp. 2d at 1120 n.2.

It is inconceivable that federal agency heads could personally review all this material. Agencies employ large numbers of scientists, economists, and other professionals to do the work that Congress charged them with doing, precisely because the agency's ultimate decisionmakers lack the ability to do all that work by themselves. Yet, under Petitioners' theory, any material an agency's staff considers but does not provide directly to the final decisionmaker must be omitted from the administrative record.[14] Petitioners even go so far as to suggest that including such material in the record would be an "extraordinary departure" from the established norms governing judicial review of federal agency action. Pet. 5.

Petitioners' characterization cannot be squared with lower courts' longstanding reliance on such material through decades of administrative-law jurisprudence. *See supra* notes 3-11; *infra* note 16. Nor can Petitioners' argument be reconciled with the Department of Justice's own direction to federal

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[14] The impracticality of Petitioners' approach is demonstrated by the fact that it would either require an agency decisionmaker to review every substantial public comment received, or require the agency to omit those public comments from the administrative record. The former approach would often be literally impossible, given the volume and technical nature of such comments, and the number of informal agency actions. The latter approach would negate the APA's requirement that agencies consider and respond to public comments, 5 U.S.C. § 553(c), preventing judicial review of the adequacy of an agency's responses. *See, e.g., La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003); *Am. Mining Congress*, 907 F.2d at 1187-88.

agencies, from at least 1999, that "[t]he administrative record consists of all documents and materials directly or *indirectly* considered by the agency decisionmaker" (emphasis added), and "[i]nclude[s] documents and materials that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decisionmaker."[15]

Petitioners now attempt to recharacterize the Department of Justice's guidance as reflecting nothing more than a voluntary "cho[ice] to include more [in the administrative record] than the law requires." Pet. 25. But the APA provides for judicial review on the "whole record" of the "agency action"—and *only* that record. 5 U.S.C. § 706. If the documents that the Department of Justice has been instructing federal agencies to include in administrative records (and that those agencies have for years included) were not properly part of the "whole record" of the "agency action," then the documents should not have been placed before the courts at all. The APA does not give federal agencies one-sided authority to supplement the administrative record with whatever material they think helps their case. An agency properly includes such material in the record only because the material is part of the "whole record" of the agency action.

Petitioners' complaint about the burden of compiling comprehensive administrative records is similarly belied by both the Department of Justice's guidance and agencies' longstanding practice. The

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[15] U.S. Dep't of Justice, Env't & Nat. Res. Div., *Guidance to Federal Agencies on Compiling the Administrative Record* 1-2 (Jan. 1999), http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

many cases in which agencies have compiled voluminous records, *see, e.g.*, *supra* note 13, suggest that the burdens of which Petitioners now complain have proven manageable. Compliance with the APA may "cause inconvenience and added expense" for agencies, but "Congress has determined that the price for greater fairness is not too high." *Wong Yang Sung*, 339 U.S. at 46-47.

II. If an agency wishes to exclude deliberative materials from an administrative record, it must specifically assert and justify the claim of privilege

Judicial review under the APA may and sometimes *must* probe agency deliberations. The reviewing court must decide whether the agency "failed to consider an important aspect of the problem," "offered an explanation for its decision that runs counter to the evidence before the agency," or made no "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43-44. In answering these questions, courts often consider internal documents that evaluate evidence, discuss recommendations, reveal disagreements among staff, and otherwise disclose agency deliberations.[16] *See supra* notes 3-11. Indeed, candid,

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[16] *See, e.g.*, *Pritzker*, 828 F.3d at 1136-40 (agency scientists' analysis and recommendation); *Nat. Res. Def. Council v. U.S. EPA*, 808 F.3d 556, 570 (2d Cir. 2015) (agency advisory committee reports); *W. Watersheds Project*, 632 F.3d at 479, 497 (agency scientists' analyses); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768-69 (9th Cir. 2007) (agency "internal memoranda," "briefing packet," and "talking points"); *Ocean Advocates v. U.S. Army*

internal agency documents are a core part of the "whole record," 5 U.S.C. § 706, and critical to a "searching and careful" judicial inquiry. *Citizens to Pres. Overton Park*, 401 U.S. at 416.

Nothing in the APA's text or history suggests that Congress intended to enfeeble judicial review by excluding such material from the "whole record" of agency action on which judicial review proceeds. Indeed, the courts did not even recognize a deliberative-process privilege until more than a decade after Congress adopted the APA's "whole record" judicial-review standard. *See Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. at 945-46; *see*

Corps of Eng'rs, 402 F.3d 846, 862-63 & n.4 (9th Cir. 2005) (agency emails); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1218 (9th Cir. 2004) (internal agency memo); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1396 (9th Cir. 1995) (provisional draft); *Suffolk Cty.*, 562 F.2d at 1385 (internal decision options document); *Tummino v. Torti*, 603 F. Supp. 2d 519, 547-48 (E.D.N.Y. 2009) (draft minutes of internal agency meeting); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 372 (E.D. Cal. 2007) (interagency emails); *Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1183-85 & n.19, 1190-93 & n.28 (W.D. Wash. 2006) (agency staff emails, draft letters, meeting minutes, and notes); *Defs. of Wildlife v. Kempthorne*, No. 04-1230, 2006 WL 2844232, at *11 n.8 (D.D.C. Sept. 29, 2006) (agency staff email); *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1236 n.41, 1239-40 & nn.47, 52, 1244-45 (E.D. Cal. 2005) (agency staff emails and similar internal correspondence); *Ctr. for Biological Diversity v. Evans*, No. 04-04496, 2005 WL 1514102, at *5 (N.D. Cal. June 14, 2005) (agency memos and draft rule never released to public); *Bonnichsen*, 217 F. Supp. 2d at 1130 (internal agency communications and meeting minutes); *Miami Nation*, 979 F. Supp. at 778 (draft reports and agency notes and logs); *Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990); *Bersani v. U.S. EPA*, 674 F. Supp. 405, 410 (N.D.N.Y. 1987) (internal agency recommendation).

also Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1304 & n.1 (Fed. Cir. 2006). And the privilege that the courts did later recognize is a qualified one. *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *Warner Commc'ns*, 742 F.2d at 1161.

The purpose of the deliberative-process privilege is to protect agency documents from discovery "so that the public will benefit from more effective government." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 582. That justification is "attenuated," however, when "the public's interest in effective government would be furthered by disclosure," *id.*, such as where a court reviews the agency action for lawfulness. After all, Congress thought that the public interest would be best served by judicial review on the "whole record" of the agency action. Thus, although the deliberative-process privilege has its place, the interests the privilege serves do not inevitably outweigh a court's need to consider materials "germane to the [agency] decision and not duplicated elsewhere in the record." *Suffolk Cty.*, 562 F.2d at 1384; *see Warner Commc'ns*, 742 F.2d at 1161; *cf. Leggett & Platt*, 542 F.2d at 658 (applying balancing test to invocation of deliberative-process privilege in discovery); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002) ("The deliberative process privilege is qualified; it may be overcome by a showing of need . . . .").

The divided decision in *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), provides no persuasive argument to the contrary. That case arose from a formal adjudication conducted by the Nuclear Regulatory Commission. *See id.* at 29 (citing

42 U.S.C. § 2239(a)). To protect the "frank deliberations of Commission members" in this trial-like proceeding, the court refused to supplement the record with a transcript of the Commissioners' closed-door deliberations. 789 F.2d at 44; *see also id.* at 45-46 (Mikva, J., concurring). That refusal is best understood as a particularized determination that the need for disclosure in that case was outweighed by the harm that would flow from disclosing a transcript of deliberations "analogous to the internal mental processes of the sole head of an agency." *In re United States*, No. 17-72917, 2017 WL 5505730, at *5 (9th Cir. Nov. 16, 2017).

San Luis Obispo Mothers did not address the contents of administrative records in *informal* agency proceedings (which are not subject to the same procedural requirements as formal adjudications, *see supra* note 12, or the same narrow definition of "record," 5 U.S.C. § 556(e)). Nor did the case hold that agencies may unilaterally exclude deliberative-process materials from agency records, without expressly justifying the exclusion.

When Petitioners claim that including deliberative materials in an administrative record is akin to "probing the mental processes" of the ultimate decisionmaker through a deposition, they misapprehend the deliberative-process doctrine's reach. Pet. 27 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)). The deliberative-process privilege can sweep in a wide array of existing agency documents that, collectively, represent a contemporaneous, written record of the agency doing its work. *See Warner Commc'ns*, 742 F.2d at 1161 (stating that the deliberative-process privilege applies

to any document that is predecisional and "deliberative in nature, containing opinions, recommendations, or advice about agency policies"). Including these documents in an administrative record is a far cry from allowing the deposition of the Secretary of Agriculture, as sought in *Morgan*. *Id.* This Court should not join Petitioners in conflating the question what agency documents an administrative record encompasses with concerns about the appropriateness of deposing a Cabinet Secretary about his mental processes.

In their attempt to extend *Morgan* into a rule that all predecisional, deliberative documents are automatically excluded from administrative records, Petitioners would turn the qualified deliberative-process privilege into an absolute privilege—and then immunize their assertions of that privilege from judicial scrutiny. The possibilities for mischief in this approach are disturbing. Federal agencies often *do* include deliberative materials in their agency records. *See, e.g., Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017) (internal, predecisional agency memo analyzing the evidence before the agency); *Wyoming*, 661 F.3d at 1264-65 (inter-agency comments); *cf. Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1082-83 (D.C. Cir. 2001) (declaration of the agency decisionmaker intended to explain his decision). Indeed, Petitioners now seem to claim affirmatively that an agency can "choose" to include deliberative material in the record for judicial review whenever the agency wants to use those materials to defend its decision. Pet. 25.

Allowing an agency to unilaterally decide when deliberative materials are included or excluded from

the record for judicial review would allow the agency to withhold only that evidence "unfavorable to its case." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. This Court has long warned against reviewing just one side of the administrative record, however. *Universal Camera*, 340 U.S. at 488; *see also City of Dana Beach v. Fed. Aviation Admin.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (stating that the record supplied by the agency may be supplemented where the agency excluded documents adverse to its decision, background information is needed to determine whether the agency considered all the relevant factors, or the agency failed to explain its action so as to frustrate judicial review). Yet Petitioners' approach would give agencies the power to create one-sided records that shield their decisions from effective judicial scrutiny, with no need to justify particular withholdings. This approach would strip judges of the ability to carry out the reviewing function that Congress assigned to them. *See Dopico*, 687 F.2d at 654.

Agencies that wish to withhold deliberative materials as privileged should do so expressly, "to permit courts and other parties to 'test[ ] the merits of the privilege claim." [17] *EEOC v. BDO USA, LLP*, __ F.3d __, No. 16-20314, 2017 WL 5494237, at *4 (5th Cir. Nov. 16, 2017) (alteration in original) (citation omitted). After all, the deliberative-process privilege is qualified; it generally applies only where "the

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[17] Unlike in *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004)— where the extraordinary circumstance of discovery sought directly from the Vice President eliminated any need to claim privilege with particularity—there is nothing extraordinary in asking an agency either to produce the "whole record," or to explain why it has not.

consequences of disclosure of the information," *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984), outweigh the public interest in fair and accurate judicial review, *see Citizens to Pres. Overton Park*, 401 U.S. at 416; *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *Suffolk Cty.*, 562 F.2d at 1384; *cf. United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting executive-privilege claim based "solely on the broad, undifferentiated claim of public interest in the confidentiality of . . . conversations" between presidents and advisors).

Empowering agencies to silently exclude from the record probative deliberative material, without allowing the privilege assertion to be tested, would make the agency itself the arbiter of such privilege claims. Agency invocations of privilege are not infallible, however, *see, e.g.*, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005); *Charles v. City of New York*, No. 11-0980, 2011 WL 5838478, at *2-3 (E.D.N.Y. Nov. 18, 2011), and the resolution of qualified privilege claims is a traditional judicial function. It is not "clear and indisputable" error, *Cheney*, 542 U.S. at 381 (internal quotation marks omitted), for a reviewing court to require an agency to justify its decision to exclude documents as privileged in these circumstances. To the contrary, courts must have appropriate tools to ensure that agencies are not deploying the deliberative-process privilege in a manner that defeats effective judicial review on the "whole record" of the agency action. 5 U.S.C. § 706.

CONCLUSION

This Court should deny the petition.

December 13, 2017 Respectfully submitted,

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No. 17-801

IN THE

Supreme Court of the United States

IN RE UNITED STATES, et al.,

Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE GOVERNOR OF COLORADO, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF MANDAMUS

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The States of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the Governor of Colorado, and the District of Columbia move this Court for leave to file the enclosed brief as amicus curiae in support of respondents, in opposition to the petition for mandamus without ten days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

In light of the extremely expedited briefing schedule set by the Court, it was not feasible to give ten days' notice. All parties have consented to the filing of the brief without such notice.

As set forth in the enclosed brief, the undersigned amici States have a strong interest in the outcome of this mandamus proceeding. First, as frequent plaintiffs in suits brought pursuant to the Administrative Procedure Act (APA), amici States have an interest in preserving meaningful judicial review of agency action. APA suits are a crucial tool by which States—including amici States—regularly hold federal agencies accountable to acting lawfully and rationally on issues of substantial public import. Second, amici States are also litigating a parallel challenge in the Eastern District of New York to petitioners' termination of the program known as "Deferred Action for Childhood Arrivals" (DACA).[1] In that matter, petitioners have attempted to rely on the same meager administrative record as produced in

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[1] *See* States' First Am. Compl., *State of New York v. Trump*, No. 17-cv-5228 (E.D.N.Y.), ECF Nos. 54 & 55.

this case,[2] and have argued, as here, that a court lacks the power to compel completion of the record or production of a privilege log.[3] Thus, the ruling here may significantly impact amici States' ability to obtain meaningful judicial review in their own challenge to petitioners' conduct in terminating DACA.

As regular plaintiffs in APA proceedings, and as regulators who are defendants in suits challenging administrative action, amici States have an important perspective on the outcome of this petition. Through their experiences as plaintiffs, amici States understand how the probing judicial review contemplated by the APA depends on an agency producing the whole administrative record, especially in cases of informal agency action. And as defendants in suits challenging agency action, amici States are familiar with the burdens of compiling a complete record, which our experiences have shown to be neither unusual nor disproportionate. Moreover, amici States' have a sharpened perspective on the deficiencies in the exact record produced here through participation in the parallel New York suit where petitioners attempt to rely on the same incomplete record.

Pursuant to Supreme Court Rule 37.1, the undersigned amici States therefore seek to file this brief in order to support respondents' position that mandamus relief is not warranted.

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[2] Proposed Admin. Record, *State of New York*, ECF No. 56-1.

[3] Mem. & Order at 3 (Oct. 19, 2017), *State of New York*, ECF No. 65.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in opposition to the mandamus petition.

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QUESTIONS PRESENTED

1. Whether a federal agency may require judicial review to proceed based on an administrative record that it acknowledges does not include all of the responsive, nonprivileged documents that agency decisionmakers actually considered.

2. Whether a federal agency may refuse to document in a log the items it is withholding from an administrative record as assertedly privileged.

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INTERESTS OF AMICI STATES

The amici States—New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the Governor of Colorado, and the District of Columbia—file this brief to protect their interests in preserving meaningful judicial review of federal agency action, and their particular interests in production of the complete administrative record underlying petitioners' decision to terminate the program known as "Deferred Action for Childhood Arrivals" (DACA).

Petitioners seek to reshape the scope of review of agency decisionmaking in a manner that would undermine judicial review in a wide swath of challenges to the outcome of informal agency proceedings. States—including the amici States—are often plaintiffs in Administrative Procedure Act (APA) suits seeking to ensure that federal agencies have acted lawfully and rationally in matters affecting our residents. In that capacity, we depend on the ability of a court to assess whether the agency improperly disregarded any factors or evidence that it should have considered.

As particularly relevant here, the amici States are litigating a parallel challenge to petitioners' termination of DACA where petitioners similarly refuse to provide a complete administrative record that includes, at a minimum, all of the nonprivileged material considered by the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—the decisionmaking agencies that petitioners have identified to the district courts reviewing their termination of DACA.

Amici States also regularly defend challenges to agency actions, and are thus familiar with the burdens of compiling complete records. In our experience, the burdens about which petitioners complain here are neither unusual nor disproportionate.

Under the rule proposed by petitioners, agencies desiring particular outcomes could disregard information contrary to their position, eliminate that information from the administrative record, and thereby insulate their decisions from review for arbitrariness or unlawfulness. The amici States have a pressing interest in ensuring that the federal government remains subject to basic administrative-law principles enabling thorough review of agency action.[1]

STATEMENT

Since the 1960s, DHS and its predecessors have established more than 20 deferred action or similar programs that grant certain protections from removal to large groups of undocumented immigrants in defined categories. *See* U.S. Br. 5, *United States v. Texas* (No. 15-674 (U.S.)), 2016 WL 836758. In June 2012, DHS issued a memorandum establishing one such program, DACA, which allowed certain undocumented individuals brought to the United States as children to request deferred action and work authorization for renewable two-year periods. Pet. App. 47a-51a.

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[1] The parties consent to the filing of this brief. Because this Court's expedited schedule did not permit notice at least ten days before filing, amici States are concurrently filing a motion requesting leave to file this brief.

In 2015, Texas and other States sued to enjoin a different deferred action program (DAPA[2]) as well as certain 2014 changes to the DACA program. *See Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015). That lawsuit did not challenge the original DACA program. After the Fifth Circuit affirmed the grant of a preliminary injunction, finding that the Texas plaintiffs were likely to prevail on certain statutory claims, the United States sought this Court's review and vigorously defended the programs. *See* U.S. Br. 73-76, *Texas* (No. 15-674 (U.S.)). This Court affirmed by an equally divided court. 136 S. Ct. 2271 (2016) (per curiam).

On June 29, 2017, the attorneys general of Texas and other States wrote a letter to Attorney General Jeff Sessions threatening legal challenges against DACA if the program was not rescinded by September 5, 2017. N.D. Cal., No. 17-cv-5211 (*Regents of Univ. of Cal.*), Dkt. No. 64-1, images 238-239 ("Proposed Admin. Record").

On September 5, the Attorney General announced the termination of DACA. *Id.*, Dkt. No. 1-3, image 2. That same day, Acting DHS Secretary Elaine Duke issued a memorandum formally terminating DACA on the basis of perceived litigation risk and citing as justification a one-page letter from the Attorney General. Pet. App. 61a-69a. The Attorney General's letter asserted, with no explanation other than a citation to the Fifth Circuit's decision, that DACA had "the same legal and constitutional defects that courts recognized as to DAPA." Proposed Admin. Record at

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[2] The program's formal name is the "Deferred Action for Parents of Americans and Lawful Permanent Residents."

image 251. In fact, neither the Fifth Circuit nor any other court had ruled on DAPA's constitutionality.

The State of California and other governmental and private plaintiffs sued in the Northern District of California to challenge petitioners' conduct in terminating DACA, asserting claims under the APA and the Constitution. *See* Pet. App. 2a. On October 6, petitioners produced an administrative record comprising fourteen publicly available documents. Pet. App. 5a. The district court ordered completion of the record and production of a privilege log on October 17, explaining that the hand-picked materials Acting Secretary Duke had elected to rely on to support her final decision did not constitute the full record. *See* Pet. App. 8a, 26a-39a. Addressing specific claims of privilege petitioners had cursorily asserted in a partial privilege log, and after viewing certain documents *in camera*, the court determined that some documents had been properly withheld and others should have been produced.[3] Pet. App. 43a.

Petitioners unsuccessfully sought mandamus relief from the Ninth Circuit to avoid these and other discovery obligations. Pet. App. 15a. Petitioners then sought a stay of discovery from the district court, which granted an additional month—until December 22—for petitioners to produce the complete record and privilege log. Pet. App. 45a-46a. Rather than use that

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[3] The court also held that because petitioners proffered a legal reason for terminating DACA, but had failed to provide any meaningful analysis or explanation for that rationale in the decisional documents, petitioners could not rely on attorney-client privilege as a blanket shield to prevent disclosure of materials that would provide the missing reasoning. Pet. App. 37a.

time to detail any specific assertions of privilege, petitioners filed the instant petition.

Similarly, petitioners have contested their obligation to produce a complete record in a suit brought by amici States and other plaintiffs challenging the termination of DACA in the Eastern District of New York. *See* States' First Am. Compl., *State of New York v. Trump*, No. 17-cv-5228 (E.D.N.Y.), ECF Nos. 54 & 55. Petitioners submitted the same sparse proposed record as here, and accordingly, the New York court ordered petitioners to complete the record and submit a privilege log. Mem. & Order at 3 (Oct. 19, 2017), *State of New York*, ECF No. 65. Rather than doing so, petitioners filed a mandamus petition that is currently pending before the Second Circuit, which has stayed discovery. *See* Order, *In re Duke*, No. 17-3345 (2d Cir. Oct. 24, 2017), ECF No. 41. In the New York litigation, no claims of privilege have been presented to any court for decision.

SUMMARY OF ARGUMENT

The district court here followed well-established principles when directing petitioners to complete a deficient administrative record compiled based on an incorrect legal standard. Petitioners' production of only those documents they have decided to rely on in supporting the final agency decision—rather than the documents that were actually before the agency decisionmakers here—does not meet their obligation under the APA to produce the whole administrative record. The district court's direction to complete the administrative record thus cannot constitute the kind of egregious error warranting the extraordinary writ of mandamus. Nor can the district court's routine

decision to require petitioners to document assertions of privilege in a log constitute grounds for mandamus relief.

This Court should reject petitioners' attempt to use mandamus as a vehicle to reshape basic tenets of administrative law. The consequence of accepting petitioners' arguments would be a dramatic curtailment of the probing judicial review of administrative action that the APA contemplates, and that courts have applied for decades.

ARGUMENT

I. THE DISTRICT COURT'S ORDER TO PRODUCE THE WHOLE ADMINISTRATIVE RECORD APPLIED SETTLED LEGAL PRINCIPLES AND CANNOT JUSTIFY MANDAMUS.

A. The Determination of What to Include in an Administrative Record Is Not Left to an Agency's Unreviewable Discretion.

Petitioners urge this Court to accept the unprecedented and dangerous position that an agency producing an administrative record for judicial review of the outcome of an informal agency proceeding may present only those items on which it chooses to rest its decision, rather than a complete record of the materials that were actually before the agency; and that the reviewing court has no power to compel completion of that partial, sanitized, and potentially biased record. *See, e.g.*, Pet. 21; Stay 24; Stay Reply 4. This approach would vitiate the "thorough, probing, in-depth review" of agency action contemplated by the APA. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Without the complete administrative record, a reviewing court cannot assess whether the agency considered all "relevant factors," "failed to consider an "important aspect of the problem," or resolved disputed issues in a way that "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). Accepting petitioners' position would thus seriously harm the ability of courts to ensure that federal agencies act lawfully and rationally, including in matters affecting the amici States and their residents.

To enable meaningful review, the APA requires that a federal agency produce "the full administrative record that was before the [decisionmaker] at the time he made his decision." *Overton Park*, 401 U.S. at 419 (discussing 5 U.S.C. § 706). The "whole record" includes not only the "evidence supporting" an agency's ultimate determination, but also the materials that "fairly detract[]" from that position. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Courts regularly police whether an agency has met its obligation to produce a complete record and have routinely rejected agencies' attempts to proceed on less than the entire record.[4] For example, in *Overton Park*, when confronted with a set of documents that "clearly d[id] not constitute the 'whole record' compiled by the agency," this Court remanded to the district court for review based on a record including those documents.[5] 401 U.S. at 420.

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[4] *See* cases discussed *infra* at 9-10.

[5] The Court also noted that if the completed administrative record did not "disclose the factors that were considered or the

Indeed, petitioners have not identified a single appellate decision supporting the view that a reviewing court is confined to the administrative record an agency decides to present even if that record is demonstrably incomplete. The decisions from this Court on which petitioners rely merely affirm that the APA touchstone for evaluating agency action is the set of materials actually before the agency at the time the agency made its decision.

In *Florida Power & Light Co. v. Lorion*, the Court explained that judicial review of agency decision-making should presumptively proceed on the record compiled "in the course of informal agency action," as opposed to a record created through de novo factfinding by a district court." 470 U.S. 729, 743-44 (1985). There was no dispute that the record "already in existence" and "present[ed] to the reviewing court" was that complete record. *Id.* at 744. Similarly, in *Camp v. Pitts*, all parties agreed that the agency had placed the "entire administrative record already in existence" before the reviewing court. 411 U.S. 138, 142 (1973) (per curiam). Petitioners are thus wrong to read *Florida Power* and *Camp* as suggesting that an agency has discretion to submit less than the complete

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Secretary's construction of the evidence," it could be necessary—upon a showing of impropriety or bad faith—for the District Court to take some additional evidence, such as testimony from agency officials. *Overton Park*, 401 U.S. at 420. The Court thus recognized that requiring a complete administrative record is different from requiring supplementation or expansion of an administrative record with materials not before the agency at the time of the decision. Petitioners' are wrong to conflate (Pet. 20) those separate inquiries and standards.

record of documents before the agency decision-makers.

Appellate courts have uniformly rejected that position as inconsistent with the APA's requirements for judicial review.[6] As the D.C. Circuit has explained, allowing an agency to selectively omit parts of the record would permit the agency to insulate its decisions by "withhold[ing] evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). "For review to go forward on a partial record," a reviewing court "would have to be convinced that the selection of particular portions of the record was the result of mutual agreement between the parties *after both sides had fully reviewed the complete record*." *Id.* at 793 (emphasis added). Anything else would be "fundamentally unfair" to an APA plaintiff. *Id.* This is because, in light of the "asymmetry in information" between the plaintiff and the agency, there would otherwise "be no check upon the failure of the agency to disclose information adverse to it." *Id.* Put another way, in the context of an APA challenge to informal agency action, "the normal pressures towards inclusion of all relevant material in the record before the court are absent." *Id.* Thus, a court must endeavor to "obtain the full administrative record" before deciding the claim. *Id.* at 792.

Similarly, the Second Circuit has held that where APA plaintiffs dispute the completeness of the administrative record produced by the agency, a court should not decide the case without first verifying that

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[6] Because petitioners are incorrect (*see* Pet. 17) that there is any conflict in appellate precedent on the issues raised in this proceeding, their alternative request for a writ of certiorari should be denied.

the record is complete. *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). The court reasoned that "[d]etermining what constitutes an agency's informational base is vital": just because "defendants presented documents that seemed to support the rationality of their actions does not mean that the same conclusion would have been reached if the Court had been aware of other information that was before the agency." *Id.* Thus, a court should not proceed to summary judgment on a disputed record before assessing "whether some portions of the full record were not supplied." *Id.* And an agency's claim to "have submitted the full record will not substitute for [a court's] independent consideration of that issue." *Id.*

The other circuits to have addressed the issue have reached the same result. For example, the Ninth Circuit has permitted discovery where APA plaintiffs plausibly allege that an agency has not presented the reviewing court with the "full administrative record," but rather has relied on documents or materials not included in the proffered record. *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.); *see also Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (explaining that the "whole administrative record . . . is not necessarily those documents that the *agency* has compiled and submitted" (quotation marks omitted)). The Tenth Circuit has similarly observed that an agency "may not unilaterally determine what constitutes the Administrative Record." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

As these courts have recognized, petitioners are wrong in contending (Pet. 25) that no external check is required because an "agency bears the risk of an insufficient record." By omitting material that does

not support its decision, the agency prevents APA plaintiffs from challenging the agency's response to adverse material.

It is a long-standing and central tenet of APA review that a court must assess not only the evidence justifying an agency's conclusion, but also all of the "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487-88. Without such information, a court cannot consider whether "the agency has made a reasoned decision based on its evaluation of the significance" of all available information. *See Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 378 (1989).

If given unilateral power to withhold adverse facts, studies, or analyses in their possession, agencies could make it impossible for a reviewing court to identify flaws in their reasoning or conclusions. And that would seriously impair ability of States—including the amici States—to obtain the judicial review that is a critical part of the mechanism designed by Congress to hold federal agencies accountable to their co-sovereigns and to the public.[7]

Petitioners' assertions about the burdens of producing a complete administrative record establish no grounds for circumventing the well-established scope of APA record review. In our capacity as defendants in challenges to agency action, the States—

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[7] States regularly challenge the rules, regulations, and policies promulgated by federal agencies, playing a critical role in checking agencies on issues of major public importance under administrations of both political parties. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

including amici States—well understand that administrative records are often large and take time and effort to compile. Indeed, agency decisions involving significant questions of law and policy may require consideration of complex technical, environmental, or scientific information, and records may potentially include tens-of-thousands, hundreds-of-thousands, or millions of documents or pages.[8] The records in such cases are large precisely because the issues are important, or complicated, or both.

In this case, for example, the termination of DACA will have dramatic consequences for approximately 800,000 DACA recipients, as well as their families, communities, and employers—including amici States. Any decision to terminate DACA in an "orderly" manner (Pet. App. 67a) would have to take account of, among other things, the likely consequences of particular methods of ending a program that had engendered such significant reliance interests. Meaningful judicial review of such a decision requires that a reviewing court have access to the same items considered by the agency.

Petitioners are wrong in suggesting that the nature of the informal decisionmaking process they have selected here vests them with "more latitude" (Pet. 29) to tailor a record of their choosing. In formal agency adjudications, where the record is defined by

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[8] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (per curiam); *Hyatt v. United States Patent & Trademark Office*, 146 F. Supp. 3d 771, 774 (E.D. Va. 2015); *Klamath-Siskiyou Wildlands Ctr. v. National Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1044 (N.D. Cal. 2015).

statute,[9] interested parties may call and cross-examine witnesses, the proceedings must be transcribed, and the agency may not take evidence through ex parte communications.[10] And in informal adjudications and informal rulemaking, federal law provides mechanisms for interested persons to place information and arguments before the agency and into the record.[11] But in an informal decisionmaking process like the one used here, there are no formal safeguards, nor even any defined opportunity for interested persons to submit argument or information. In such a case, it is even more critical that reviewing courts understand what constitutes the agency's informational base so that they may assess "whether some portions of the full record were not supplied," *Dopico*, 687 F.2d at 654. Otherwise, the court would not be equipped to evaluate whether the agency considered all of the "relevant factors," or whether the agency's ultimate conclusion "runs counter to the evidence before the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 42-43.

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[9] The record in a formal adjudicative proceeding consists of "[t]he transcript of testimony and exhibits, together with all the papers and requests filed in the proceeding." 5 U.S.C. § 556(e).

[10] *See* 5 U.S.C. § 556(d) (right to cross-examine); *id.* § 556(e) (transcribed hearings); *id.* § 557(d)(1)(A) (barring ex parte communications).

[11] *See* 5 U.S.C. § 553(c) (allowing interested persons to submit "written data, views, or arguments" in informal rulemaking proceedings); *id.* § 554(c)(1) (similar provision for informal adjudications).

B. Petitioners Had No Right—Much Less a Clear and Indisputable Right—to Resist Completing the Record and Producing a Privilege Log.

Applying settled law, the district court required petitioners to complete the administrative record and produce a log to document any basis for withholding materials that would otherwise be within the administrative record. It properly rejected petitioners' assertions that they need not provide the documents that were actually before the agency decisionmakers, and may instead hand-pick a record based on a unilateral determination of "what materials are relevant to [an agency's] decision and on what basis it is willing to defend its actions." Stay Reply 4. Mandamus is not available here to avoid the obligations set by the district court.

Before a writ of mandamus will issue, petitioners must establish, inter alia, a "'clear and indisputable'" right to the relief sought. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (quoting *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)). Under existing law and longstanding practice, and in light of the record they have submitted and their own statements characterizing what they have produced, petitioners cannot establish any right—much less a clear and indisputable right—to avoid producing a complete administrative record and a privilege log.

1. Petitioners' statements show that they have not produced a complete record.

Petitioners have provided shifting descriptions of the record that they have produced, advising this Court now that they have produced "all non-

deliberative materials compiled and considered by the Acting Secretary in reaching her decision." Pet. 7. But petitioners' own admissions show that they have not in fact submitted all responsive, nonprivileged documents that were actually considered by the Acting Secretary of DHS—although such documents are certainly part of the complete administrative record. Petitioners admit, for example, that the Acting Secretary personally viewed several articles of media commentary addressing DACA that, although not privileged in part, were not included in the record. Pet. App. 36a. Moreover, petitioners admit that they have identified numerous other responsive, nonprivileged documents that were before the agency and bear on the termination of DACA, but are not in the record they presented. Stay Add. 23, 33. Petitioners thus have no clear and indisputable right to a writ of mandamus relieving them of their obligations to provide additional documents to the district court.

As this Court has explained, APA review encompasses consideration of whether the agency arbitrarily disregarded any items it should have considered, and this is no less true where a "legal and policy" determination (*see* Stay Reply 1) is concerned. *See Judulang v. Holder*, 565 U.S. 42, 58 (2011). For example, when an agency changes its position on a policy matter, there may be "serious reliance interests that must be taken into account," such that "[i]t would be arbitrary or capricious to ignore such matters." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Perhaps for this reason, DOJ's long-standing past guidance to federal agencies on compiling the administrative record—withdrawn concurrently with petitioners' attempt to seek mandamus review from

the Ninth Circuit—directed that the record should encompass "documents that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final decisionmaker."[12] Similarly, appellate courts have explained that a record is incomplete if it does not include "all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches*, 994 F.2d at 739; *accord Thompson*, 885 F.2d at 555.

As DOJ and these courts understood, a record that allows for meaningful review must include the documents developed "throughout the agency review process," including by the final decisionmaker's top subordinates. *Bar MK Ranches*, 994 F.2d at 739. When an agency considers a complex issue, the chief decisionmaker typically will not "wade through the entire record personally," but will "delegate detailed consideration of the administrative record to [her] subordinates while retaining the final power of decision." *National Small Shipments Traffic Conf., Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1450 (D.C. Cir. 1984).[13] Accordingly, the materials

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[12] U.S. DOJ, Env't & Natural Resources Div., Guidance to Federal Agencies on Compiling the Administrative Record 2 (Jan. 1999) (internet); *accord* U.S. Dep't of the Interior, Standardized Guidance on Compiling a Decision File and Administrative Record 5 (June 27, 2006) (internet); U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Guidelines for Compiling an Administrative Record 4 (Dec. 21, 2012) (internet). (For authorities available on the internet, full URLs are listed in the table of authorities.)

[13] *See also National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (documents are part of record if they "might have influenced the agency's decision"); *accord Bethlehem Steel Corp. v. United States*

reviewed by subordinates will often constitute the informational base that drives the agency's decisional process, and therefore must be part of the administrative record. Allowing an agency to exclude such materials would prevent reviewing courts from meaningfully testing the rationality of agency decisionmaking, and undermine the ability of APA plaintiffs—including amici States—to use APA review as a counterweight against arbitrary exercises of federal power.

The district court thus committed no error, let alone any mandamus-worthy error, in concluding that the subset of documents provided does not comprise the whole administrative record. By petitioners' own admission, that set of documents excludes materials before Acting Secretary Duke pertaining to the termination of DACA that she chose not to "focus on" when "making her decision."[14] It also excludes the

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Envtl. Prot. Agency, 638 F.2d 994, 1000 (7th Cir. 1980) (quoting *National Courier*); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1993) (administrative record includes any document that was "before the agency pertaining to the merits of its decision"); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (administrative record includes document that "contained information germane to the decision and not duplicated elsewhere in the record").

[14] Letter from Dep't of Justice to Magistrate Judge 8 (Oct. 16, 2017), *Batalla Vidal v. Baran*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 85. Petitioners' justification for that exclusion highlights their disregard of the proper legal standard. As they have asserted: "Plaintiffs may wish that the Acting Secretary had considered" a particular letter she received when "making her decision, but her focus on other documents is the reason it was not included." *Id. But see Judulang*, 565 U.S. at 58.

documents considered and developed during DHS's review process. Indeed, in their declarations to this Court, petitioners admit that they have identified a number of responsive, nonprivileged records considered by DHS that are not in the record produced to the district court. Stay Add. 23, 33. And although petitioners have identified AG Sessions as a joint decisionmaker in terminating DACA,[15] the record excludes all documents before the Attorney General at the time of the challenged decision.

Petitioners' hand-picked administrative record also includes no materials detailing the consideration of "the risks" of "litigation" that petitioners offer as a central rationale for their decision. *See* Stay Reply 1. Such materials would show, for example, how petitioners determined that terminating a program of crucial importance to hundreds of thousands of individuals and employers throughout the country would result in fewer litigation burdens than defending the program against a single challenge brought in a single court.[16] And it would include some explanation of the reasons for Attorney General Sessions's determination that DACA is unconstitutional—a dramatic reversal in position for DOJ, which has previously identified abundant legal authority supporting DACA and related programs, including in

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[15] *See* Mem. & Order on Mot. to Dismiss (Nov. 9, 2017), *Batalla Vidal*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 104.

[16] The Attorney General has suggested he may have had out-of-court communications with Texas concerning the termination of DACA. *Hr'g on Oversight of the Justice Department, before S. Comm. on Judiciary*, Video 1:33:44 (Oct. 18, 2017) (internet) (unofficial transcript at 2017 WL 4677754). Any such communications were likely central to an assessment of litigation risk and should be made part of the administrative record.

a 2014 opinion from the Office of Legal Counsel and in 2016 briefs to this Court.

2. Petitioners have no right to avoid listing assertedly privileged documents in a log.

It is standard practice that where a litigant asserts that privilege doctrines justify its withholding of documents germane to the litigation—as DHS and DOJ do here—a court may direct the production of "an adequately detailed privilege log" in order "[t]o facilitate its determination" of that issue.[17] *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (quotation marks omitted). This is equally true where the litigant is an agency, and the legal claims implicated by the document arise under the APA. Indeed, the ordinary practice of various federal agencies refutes petitioners' suggestion (Pet. 30) that producing a privilege log in an APA case is either unusual or excessively "onerous."

Guidance issued by the Department of the Interior in 2006 instructs that agency to create and file "a privilege index" with an administrative record, identifying "the nature of any privilege" asserted. U.S. Dep't of the Interior Guidance, *supra*, at 12-13. A 2012 guidance document issued by a division of the Department of Commerce recognizes that "[d]ocuments on the Privilege Log are considered part of the

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[17] Here, for example, a privilege log would permit the district court to test the Attorney General's suggestion that any communications with Texas—the entity threatening litigation against the Attorney General—on his decision to rescind DACA are privileged work-product and thus need not be disclosed. *Hr'g on Oversight of the Justice Department*, *supra*, n.16.

Administrative Record," and should be provided to the court and parties to allow resolution of "any disputes about whether such documents must be made available." U.S. Dep't of Commerce, Guidelines, *supra*, at 14. And the just-rescinded guidance document that DOJ issued to federal agencies in 1999 provided that where "the administrative record includes privileged documents and materials," an "index of record must identify the documents and materials . . . and state on what basis they are being withheld." DOJ Guidance, *supra*, at 4.

Petitioners identify no authority for the proposition that a court lacks the power to require an indexing of the supposedly privileged documents withheld from an administrative record. Although they cite (*see* Pet. 27-28) the decision in *San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission*, that case concerned whether the court was "warranted in examining the deliberative proceedings of the agency," not whether the agency could refuse to document assertions of privilege in a log. 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc). The government did not claim, and the court did not uphold, the right to refuse to identify assertedly privileged documents. *Id.* at 44.

A blanket rule that agencies need not produce privilege logs would undermine the statutory scheme that provides for judicial review as a means of holding federal agencies accountable. If there were no possibility that a court might scrutinize a claim of privilege, agencies would have a strong incentive to make overbroad assertions of privilege, denying courts the materials needed for meaningful judicial review and impairing the rights of challengers.

Petitioners assert that they need not produce a privilege log because all the documents that they seek to exclude are "categorically outside the administrative record." Pet. 30. But this argument is circular: the withheld documents are outside the record only if they are in fact privileged, claims of privilege are subject to judicial review, and courts cannot test a claim of privilege without a log identifying the documents asserted to be privileged.[18] Accordingly, petitioners cannot show that the district court committed any error in ordering a privilege log—much less a "clear and indisputable" error. *See Hollingsworth*, 558 U.S. at 190.

II. THE DISTRICT COURT HAS NOT AT THIS POINT TAKEN ANY ACTION THAT COULD SERVE AS A PREDICATE FOR MANDAMUS RELIEF.

To obtain the extraordinary remedy of mandamus, petitioners must show a "clear abuse of discretion or conduct amounting to usurpation of the judicial power." *Mallard v. United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989) (quotation and alteration marks and citations omitted). As repeat litigants against federal agencies, the States—including amici States—have a strong interest in ensuring that such agencies cannot use mandamus relief to circumvent the initial reviewing court's

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[18] If some limited class of documents is subject to a categorical privilege, as petitioners suggest (Pet. 31-32), the appropriate remedy is not the broad mandamus relief that petitioners seek, but a more tailored ruling that petitioners may assert privilege categorically for that set of materials. Petitioners' own admissions (*see* Stay Add. 23, 33) establish that they are aware of many responsive documents that are not subject to any such categorical and unqualified privilege.

consideration of privilege claims. Mandamus is a remedy "reserved for really extraordinary causes," *Dolan v. United States*, 560 U.S. 605, 628 (2010) (quotation marks omitted), not APA record disputes that lower courts are best equipped to address in the first instance.

Here, petitioners assert that they had to file a mandamus petition because they have had no "opportunity to perfect" their "invocations of privilege" of the documents they listed on an initial, partial privilege log. Stay Reply 13. But they have had nearly two months since the district court found, based on *in camera* review, that thirty-five logged documents should be included as part of the record. Moreover, after the Ninth Circuit denied mandamus relief, the district court provided petitioners with an additional month before any further documents or logs need be produced. Petitioners could have used that time to file a motion for reconsideration or for a protective order in which they could have explained, for the first time, the in-depth factual and legal bases for why they believed the documents at issue were privileged. Instead they filed the instant petition.

Though petitioners have taken the first step of producing a log, they have not yet taken the further steps necessary to substantiate a valid claim of privilege. For example, to assert that a document is protected from disclosure as deliberative, an agency supervisor who personally considered the information must offer a "detailed specification of the information for which the privileged is claimed." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). But rather than develop any specific claim before the district court, as they could have done, petitioners have elected to preempt the district court's document-by-document

analysis by filing a mandamus petition that challenges overarching principles of administrative review.

The district court cannot have committed a clear abuse of discretion or usurpation of power, *see Mallard*, 490 U.S. at 309, with respect to issues that have not yet been squarely raised or fully presented for its consideration. Indeed, to date, petitioners have identified only one document that is asserted to be within the Executive privilege,[19] and have identified that document only to this Court. Privilege issues relating to that document—alleged to be a memorandum from White House Counsel to the President (*see* Pet. 31-32)—should be presented with specificity to the district court in the first instance. This Court should not presume that the district court will fail to give appropriate weight to valid claims of privilege, or that it will erroneously reject claims of privilege that are detailed in briefing. Because the district court cannot have clearly abused its discretion before it has had a meaningful opportunity to exercise such discretion, this Court should deny petitioners' request for mandamus relief.

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[19] Petitioners also argue (Pet. 22) that the district court improperly allowed discovery of materials from the White House before ruling on a threshold motion to dismiss. But for the reasons explained in the New York action, petitioners' threshold justiciability and jurisdictional arguments are inconsistent with this Court's precedents. *See* Mem. & Order (Nov. 9, 2017), *Batalla Vidal*, No. 16-cv-4756 (E.D.N.Y.), ECF No. 104.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for mandamus and petitioners' alternative request for certiorari.

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No. 17-801

In the Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

The State of Texas respectfully moves for any leave needed to file the enclosed brief as amicus curiae in support of the petition for a writ of mandamus, without 10 days' advance notice to the parties of amicus' intent to file. *Cf.* Sup. Ct. R. 37.2(a).

1. *Statement of Movant's Interest.* Plaintiffs' goal in this lawsuit is to revive a deferred-action program (DACA) that is materially identical to two programs (Expanded DACA and DAPA) invalidated by the Fifth Circuit in a ruling affirmed by an equally divided vote in this Court. *See Texas v. United States*, 809 F.3d 134, 172, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

Texas led the group of States challenging those two deferred-action programs. Pet. App. 63a. And Texas led the group of States notifying the federal government of their intent to challenge DACA on the same grounds, if DACA was not rescinded. Pet. App. 66a. Texas thus has a keen interest in this case, and its views "may be of considerable help to the Court." Sup. Ct. R. 37.1.

Texas's interest is made even stronger by the staggering scope of discovery that plaintiffs seek. Plaintiffs' incorrect view of judicial review under the Administrative Procedure Act (APA) has led them to seek far more than the federal government's internal deliberative material. Plaintiffs have also noticed a deposition of the Attorney General of Texas and subpoenaed material held by him. The propriety of the orders challenged here thus substantially affects Texas's interests.

2. *Statement Regarding Timing.* The State of Texas respectfully requests any leave needed to file the enclosed brief without 10 days' advance notice to the parties of the State's intent to file. This Court's rules allow the filing of an amicus brief in support of a petition for an extraordinary writ (such as mandamus) "within 30 days after the case is placed on the docket." Sup. Ct. R. 37.2(a). Here, that amicus-brief deadline is December 30, 2017; the case was placed on the docket on December 1, 2017, and this Court's recent scheduling order accelerated only the deadline for a response to the petition, not for amicus briefs. Because the enclosed amicus brief is filed more than 10 days before this brief's deadline, Rule 37.2(a) does not require advance notice to the parties. Nonetheless, given the purpose of the Rule, the State files this motion for any leave that is necessary to file the enclosed amicus brief without 10 days' advance notice to the parties of the State's intent to file. All parties have consented to this requested relief.

This request is justified by the expedited consideration of this matter of significant national interest. The court of appeals heard oral argument on November 7, 2017, and entered its 2-1 order denying the petition for a writ of mandamus on November 16, 2017. An emergency motion for an administrative stay was filed in the court of appeals on November 17, 2017, which was denied by that court on November 21, 2017. An application to this Court for a stay was filed on December 1, 2017, and this Court entered a stay and accelerated the deadline for a response to the petition only three business days ago, on December 8, 2017. Because that recent ac-

celeration of the response deadline implicates the purpose of Rule 37.2(a)'s requirement of 10 days' advance notice—a requirement that otherwise would not be implicated by filing the enclosed brief today—the State's request for any leave necessary to file the enclosed brief is justified by the recent deadline acceleration.

Apart from any leave needed because of the absence of 10 days' advance notice, leave is not required because this brief is presented on behalf of a State by its Attorney General. *See* Sup. Ct. R. 37.4.

CONCLUSION

The State of Texas respectfully requests that the Court grant any leave needed to file the enclosed brief supporting the petition for a writ of mandamus.

Respectfully submitted.

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In the Supreme Court of the United States

No. 17-801

IN RE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae is the State of Texas.[1] Plaintiffs' goal in this lawsuit is to revive a deferred-action program (DACA) that is materially identical to two programs (Expanded DACA and DAPA) struck down by the Fifth Circuit in a ruling affirmed by an equally divided vote in this Court. *See Texas v. United States*, 809 F.3d 134,

[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus contributed monetarily to the preparation or submission of this brief. Due to the recent acceleration of the deadline for a response to the petition for a writ of mandamus, amicus is now unable to provide the parties with notice of intent to file ten days before the deadline for a response, which seems contemplated by the spirit, though not the text, of this Court's Rule 37.2. Accordingly, amicus also submits, as one document with this brief, *see* Sup. Ct. R. 37.3(b), an accompanying motion for any leave necessary to file this brief. All parties have consented to the filing of this brief.

172, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

Texas led the group of States challenging those two deferred-action programs. Pet. App. 63a. And Texas led the group of States notifying the federal government of their intent to challenge DACA on the same grounds, if DACA were not rescinded. Pet. App. 66a. Texas thus has a keen interest in this case, and its views "may be of considerable help to the Court." Sup. Ct. R. 37.1.

Texas's interest is made even stronger by the staggering scope of discovery that plaintiffs seek. Plaintiffs' incorrect view of judicial review under the Administrative Procedure Act (APA) has led them to seek far more than the federal government's internal deliberative material. Plaintiffs have also noticed a deposition of the Attorney General of Texas and subpoenaed material held by him. The propriety of the orders challenged here thus substantially affects Texas's interests.

SUMMARY OF ARGUMENT

Plaintiffs are trying to use the Administrative Procedure Act in an unprecedented way. Plaintiffs cloak their expedition for internal deliberative material held by the federal government as a mere request for a "complete" administrative record. Judge Watford persuasively explained below why mandamus should be granted to prevent that intrusion: "The order sweeps far beyond materials related to the sole reason given for rescinding DACA"—the Texas-led coalition's successful challenges to the legality of materially identical programs. Pet. App. 19a (Watford, J., dissenting).

What is more, the damage from plaintiffs' novel view of APA review does not end with the federal government. The intrusion on deliberative functioning extends to the State of Texas as well. Plaintiffs have tried to subpoena documents from Texas's counsel and depose the Attorney General of Texas. But the Texas Attorney General cannot possibly be a relevant actor for analyzing whether the federal Executive Branch acted arbitrarily or capriciously in winding down DACA.

Beyond the fact that precedent prohibits plaintiffs' irrelevant fishing expedition, the underlying lawsuit's APA claims are meritless. Texas and a group of States successfully challenged the 2014 Expanded DACA and DAPA programs, and Texas along with other States publicly announced an intention to challenge the materially identical 2012 DACA program on the same legal grounds if the federal government did not agree to wind down DACA. There is nothing arbitrary or capricious about the federal government responding to that threatened litigation by withdrawing the policy that would have been challenged. In fact, plaintiffs' own pleadings in this case confirm that DACA was unlawful to begin with.

As Judge Watford recognized below in dissent, the non-arbitrary basis for the agency's action is plain from the agency record as it is: Texas has argued for years that the federal Executive Branch lacks the power to unilaterally grant unlawfully-present aliens lawful presence and work authorization—as DACA, Expanded DACA, and DAPA did.

Texas made this argument while leading a challenge to Expanded DACA and DAPA. Texas made the same argument in announcing its intent to challenge DACA in that lawsuit. And Texas made the same argument in an amicus brief in this Court, on behalf of 13 States and one Governor, detailing why DACA is substantively unlawful. Br. for the States of Texas et al. as Amici Curiae in Support of Petitioners, *Brewer v. Ariz. Dream Act Coal.*, No. 16-1180 (May 1, 2017) ("Texas Amicus Br."); *see also* Orders of June 26, 2017, *id.* (calling for the view of the Solicitor General of the United States on the certiorari petition).

The Court should grant mandamus relief reversing the district court's orders relating to discovery and the administrative record.

ARGUMENT

I. Courts May Order an Agency to Produce Only the Record Required by the APA or Other Law—Plaintiffs' Curiosity About Internal Agency Deliberation Is Not Enough.

As Judge Watford's dissent in the Ninth Circuit persuasively explained, arbitrary-and-capricious review under the APA, *see* 5 U.S.C. § 706(2)(A), must analyze only the record compiled by the agency and presented to the reviewing court. Pet. App. 16a (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)).

When an agency acts without informal (notice-and-comment) rulemaking and without formal rulemaking

or adjudication procedures,[2] as is true here, then the only statute-based limits on what the "whole record" must contain are the limits inherent in the agency's desire to have its action survive APA review, for example as not arbitrary and capricious, 5 U.S.C. § 706(2)(A). That arbitrary-and-capricious standard is narrow. As Judge Watford explained below, the reviewing court simply must be "able to discern the agency's reasons for taking the action that it did." Pet. App. 18a; *see F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (noting that clarity can be "less than ideal," so long as "the agency's path may reasonably be discerned") (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Thus, where the agency here placed only 256 pages of information into the record, judicial review asks whether only those 256 pages—and not other sources outside that administrative record—confirm that the agency has given a "reasoned explanation" for its decision. *Fox*, 556 U.S. at 515.

Plaintiffs cannot contend that the record here needs anything more for courts to discern whether the agency

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[2] The APA or other statutes may at times require certain documents to be placed in the administrative record—for example, the "written data, views, or arguments" submitted through comments when notice-and-comment rulemaking is used, 5 U.S.C. § 553(c), or material presented in hearings through formal rulemaking or adjudication, *id.* §§ 556(e), 557. But nowhere does the APA or any other statute require internal deliberative materials to be placed in the administrative record—even when notice-and-comment or formal procedures are used.

has an "explanation for its action." *Id.* The agency's memo "explicitly states" the justification for its action: "concern that the program would be invalidated in threatened litigation." Pet. App. 18a (Watford, J., dissenting). *See infra* Part III. Plaintiffs point to no statute requiring the agency to consider anything more.

Thus, plaintiffs are left with only their "desire for greater insight into how DHS arrived at its decision." Pet. App. 16a (Watford, J., dissenting). But plaintiffs' wishes are not legal authority; they do not allow plaintiffs to add material to the agency's record. Plaintiffs cannot commandeer the federal administrative apparatus simply because they disagree with the agency's policy determinations.

II. Plaintiffs' Own Position on the DACA-Rescission Memo Shows that DACA Was Never Lawful—It Modified Rights Without Notice-and-Comment Procedure.

Plaintiffs' own pleadings confirm that DACA was unlawful to begin with, because it was a substantive rule that had to go through APA notice-and-comment procedure.

A. There is no dispute that DACA is a "rule" for APA purposes. 5 U.S.C. § 551(4). Accordingly, DACA had to be issued through notice-and-comment procedure if it was a substantive rule, rather than a mere "'general statement[] of policy.'" *Texas*, 809 F.3d at 171 (alteration in original). The key distinction between policy statements and substantive rules is that policy statements cannot be "binding." *Chrysler Corp. v.*

Brown, 441 U.S. 281, 302 (1979); *see Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("We thus have said that policy statements are binding on neither the public . . . nor the agency.").

A rule is binding if it creates or modifies "rights and obligations." *E.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court held that a vastly more modest rule concerning benefits eligibility "affect[ed] individual rights and obligations" and therefore had to be treated as a substantive rule. *Id.* at 231-37. The same is true of DACA, under plaintiffs' own pleadings.

B. This mandamus petition involves orders entered in five consolidated actions and, therefore, multiple plaintiffs. *See* Pet. App. 45a. The University of California plaintiffs here contend that the DACA rescission memo "constitutes a substantive rule subject to APA's notice-and-comment requirements." Complaint 14, *Regents of Univ. of Cal. v. Dep't of Homeland Sec.*, No. 3:17-cv-5211-WHA (N.D. Cal. filed Sept. 8, 2017), ECF No. 1.

But that could be true only if DACA was itself a substantive rule—one that modifies rights and obligations. After all, if DACA were not a substantive rule that changed the rights of recipients, then winding down this program also could not be a substantive rule changing rights. Plaintiffs, though, allege that DACA is just such a substantive rule. First, plaintiffs admit that DACA purported to unilaterally confer lawful presence:

> Individuals with DACA status were "not considered to be unlawfully present during the period in which deferred action [was] in effect." USCIS FAQs.

Id. at 8. Moreover, plaintiffs admit that aliens who received DACA status would not have been able—but for DACA—to lawfully "obtain jobs and access to certain Social Security and Medicare benefits." *Id.* at 2. So the unspoken premise of plaintiffs' current complaint is that DACA was unlawful the entire time, as issued without required APA notice-and-comment procedure.

Plaintiffs point to no requirement that the government must use notice-and-comment procedure to rescind a policy unlawfully issued without that procedure. If the APA somehow required the federal Executive Branch to continue enforcing an unlawful policy while notice-and-comment procedure was used to rescind that unlawful policy, then the APA would be unconstitutional as applied to that unlawful policy. Congress cannot command the Executive Branch to ignore its Take Care Clause duty and enforce an unlawful rule.

C. The State of California plaintiffs here likewise affirmatively plead, in substance, that DACA's features meet the test for a substantive rule that required APA notice-and-comment procedure. For instance, these plaintiffs plead that "DACA Provides Numerous Benefits," which these plaintiffs describe in detail:

> 82. DACA grantees are provided with numerous *benefits*. Most importantly, they are granted the *right* not to be arrested or detained based solely

on their immigration status during the designated period of their deferred action. *See id.* at 2-3.

83. DACA grantees are granted eligibility to receive *employment authorization.*

84. DACA also opened the door to *allow travel* for DACA grantees. For example, DACA grantees were allowed to briefly depart the U.S. and legally return under certain circumstances, such as to visit an ailing relative, attend funeral services for a family member, seek medical treatment, or further educational or employment purposes. 8 U.S.C. § 1182(a)(9)(B)(i); *see also* Ex. E, USCIS, Frequently Asked Questions, DHS DACA FAQs ("DACA FAQs") (Apr. 25, 2017) Q57. Travel for vacation is not permitted.

85. Unlike other undocumented immigrants, DACA grantees are not disqualified on the basis of their immigration status from receiving certain public benefits. These include *federal Social Security, retirement, and disability benefits. See* 8 U.S.C. §§ 1611(b)(2)-(3), 1621(d). As a result, and in reliance on DHS's oft-stated position that DACA and similar programs are a lawful exercise of the agency's authority, Plaintiff States have structured some schemes around DACA which allow, for example, applicants to demonstrate eligibility for state programs by producing documentation that they have been approved

> under DACA. The rescission of DACA undermines such regulatory frameworks.
>
> 86. DACA grantees are able to secure equal access to other *benefits* and opportunities on which Americans depend, including opening bank accounts, obtaining credit cards, starting businesses, purchasing homes and cars, and conducting other aspects of daily life that are otherwise often unavailable for undocumented immigrants.

Complaint 17-18, *California v. Dep't of Homeland Sec.*, No. 3:17-cv-5235-WHA (N.D. Cal. filed Sept. 11, 2017), ECF No. 1 (emphases added).

D. The *Garcia* plaintiffs here admit the same thing. Complaint 9 ¶ 27, *Garcia v. United States*, No. 3:17-cv-5380-WHA (N.D. Cal. filed Sept. 18, 2017), ECF No. 1 ("DACA *confers* numerous important *benefits* on those who apply for and are granted DACA status.") (emphases added).

Furthermore, the *Garcia* plaintiffs state that the APA does not allow policies to remain in effect when they are "predicated on an incorrect legal premise." *Id.* Complaint 22, *California*, No. 3:17-cv-5235-WHA, ECF No. 1 (citing *Massachusetts v. EPA*, 549 U.S. 497, 532-535 (2007); *Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007)). In other words, these plaintiffs plead that the APA does not permit *ultra vires* actions—which means DACA could not have been enforced this entire time and could not be enforced in the future. Plaintiffs thus necessarily acknowledge that

they cannot obtain the relief they seek—DACA's continued operation.

E. In addition to the five challenges pending in the Northern District of California, at least four other pending lawsuits challenge the DACA rescission memo. Complaint, *Trustees of Princeton Univ. v. United States*, No. 1:17-cv-2325-CRC (D.D.C. filed Nov. 3, 2017), ECF No. 1; Complaint, *NAACP v. Trump*, No. 1:17-cv-1907-CRC (D.D.C. filed Sept. 18, 2017), ECF No. 1; 2d Am. Complaint, *Batalla Vidal v. Nielsen*, No. 1:16-cv-4756-NGG-JO (E.D.N.Y. filed Sept. 29, 2017), ECF No. 29; Complaint, *New York v. Trump*, No. 1:17-cv-5228-NGG-JO (E.D.N.Y. filed Sept. 6, 2017), ECF. No. 1. Plaintiffs in those cases similarly have pleaded, in substance, that DACA was unlawful this entire time.

Plaintiffs in the *New York* lawsuit plead that DACA affirmatively confers benefits, i.e., that DACA alters substantive rights:

> [¶] 218. DACA *confers* numerous *benefits* on DACA grantees. Notably, DACA grantees are *granted the right* not to be arrested or detained based solely on their immigration status during the time period their deferred action is in effect. *See* Ex. 14, Question 9.
>
> . . . .
>
> [¶] 220. DACA grantees are eligible to receive certain *public benefits*. These include *Social Security, retirement, and disability benefits*, and, in certain states, benefits such as driver's licenses or unemployment insurance. *See* 8 U.S.C.

> §§ 1611(b)(2)-(3), 1621(d). In the State of Washington, DACA holders also are eligible for certain state financial aid programs and state-funded food assistance. *See* Wash. Rev. Code § 28B.92.010; Wash. Admin. Code §§ 388-400-0050, 388-424-0001, 388-424-0030. In the State of New York, DACA holders are eligible for teaching and nursing licenses. *See* Comm. of Educ. Regs. §§ 59.4; 80-1.3; Ex. 78 (NYS Board of Regents Press Release, Feb. 24, 2016).

Complaint 41, *New York*, No. 1:17-cv-5228-NGG-JO, ECF No. 1 (emphases added). These plaintiffs have likewise tacitly admitted that DACA itself needed to go through APA notice-and-comment procedure because it was a substantive rule, one modifying rights:

> [¶] 289. In implementing the DHS Memorandum, federal agencies have changed the *substantive criteria* by which individuals DACA grantees *work, live, attend school, obtain credit, and travel* in the United States. Federal agencies did not follow the procedures required by the APA before taking action impacting these *substantive rights*.

Id. at 54. If DACA's rescission affected substantial rights, as these plaintiffs allege, then DACA did so too and was unlawful in the first place.

III. Texas's Threatened Litigation to Challenge DACA Would Alone Be Enough of an Administrative Record to Satisfy APA Review.

A. The record needs no expansion to perform arbitrary-and-capricious review.

As Judge Watford recognized in dissent below, Pet. App. 18a, the non-capricious basis for the agency's decision to rescind DACA is manifest: The State of Texas made very clear, in a publicly available letter, that it and a coalition of States would sue to challenge DACA if the Executive Branch did not wind it down.

On June 29, 2017, the Texas Attorney General, nine other State Attorneys General, and one Governor sent a letter to the federal Executive Branch proposing a DACA wind-down as a way to end the States' existing lawsuit challenging the Executive's ability to unilaterally confer lawful presence and work authorization; this letter is in the administrative record. A.R. 238-40.[3]

This letter was immediately made publicly available by the Texas Attorney General. That same day, the Texas Attorney General issued a press release that made the letter public.[4] It explained:

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[3] A.R. cites the Administrative Record, filed as ECF No. 64-1 in District Court No. 3:17-cv-05211 (N.D. Cal.).

[4] *AG Paxton Leads 10-State Coalition Urging Trump Administration to Phase Out Unlawful Obama-Era DACA Program*, http://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-10-state-coalition-urging-trump-administration-to-phase-out (June 29, 2017).

> In a letter sent today to the U.S. Attorney General, Texas Attorney General Ken Paxton, nine other state attorneys general and the governor of Idaho urged the Trump Administration to phase out the unlawful Obama-era Deferred Action for Childhood Arrival (DACA) program, which confers lawful presence and work permits for nearly one million unlawfully present aliens in the U.S.
>
> . . . .
>
> Attorney General Paxton and the coalition promised to voluntarily dismiss their lawsuit challenging unlawful deferred-action programs currently pending in district court if the Trump Administration agrees by September 5 to rescind DACA and not renew or issue any new DACA permits in the future.[5]

The letter itself made crystal clear why DACA was unlawful:

> As you know, this November 20, 2014 memorandum creating DAPA and Expanded DACA would have granted eligibility for lawful presence and work authorization to over four million unlawfully present aliens. Courts blocked DAPA and Expanded DACA from going into effect, holding that the Executive Branch does not have the unilateral power to confer lawful presence and work authorization on unlawfully present al-

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[5] *Id.*

iens simply because the Executive chooses not to remove them. Rather, "[i]n specific and detailed provisions, the [Immigration and Nationality Act] expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." *Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). "Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA." *Id.* Likewise, "[t]he INA also specifies classes of aliens eligible and ineligible for work authorization . . . with no mention of the class of persons whom DAPA would make eligible for work authorization." *Id.* at 180-81. Thus, "DAPA is not authorized by statute," *id.* at 184, and "DAPA is foreclosed by Congress's careful plan," *id.* at 186.

For these same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was unlawful, the original June 15, 2012 DACA memorandum is also unlawful. The original 2012 DACA program covers over one million otherwise unlawfully present aliens. *Id.* at 147. And just like DAPA, DACA unilaterally confers eligibility for work authorization, *id.*, and lawful presence without any statutory authorization from Congress.

A.R. 238-39.

This letter thus (1) threatened litigation over DACA and (2) gave a substantive explanation providing legal arguments based on precedent as to why DACA was unlawful. Even if this letter were the *only* document in the administrative record, the federal Executive Branch's decision to wind down DACA would be wholly rational and non-capricious under the APA.

B. Texas has consistently, clearly, and publicly explained for years how DACA is unlawful.

1. Texas's substantive explanation in its June 29, 2017 letter of DACA's illegality did not come out of the blue. It was based on Texas's victory, leading a 26-State coalition, in challenging the materially identical Expanded DACA and DAPA programs. *See, e.g.*, *Texas*, 809 F.3d at 174 n.139 ("DACA is an apt comparator to DAPA."). As early as April 2015, counsel of record told the Fifth Circuit that DACA was required to go through notice-and-comment procedure. Oral Argument Recording at 1:16:01-10, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) (denying stay pending appeal).

2. Even more recently, Texas led a 13-State coalition urging this Court to grant certiorari in *Brewer v. Arizona Dream Act Coalition*, No. 16-1180, where the amici States explicitly argued that DACA was unlawful—based on the same arguments that the States successfully made regarding Expanded DACA and DAPA.

For example, the States argued that DACA was unlawful because "Deferred action under DACA is much more than just a decision not to pursue removal of the

alien. The Executive deems deferred action under DACA to confer lawful presence and a host of attendant benefits." Texas Amicus Br. 3.

DACA's conferral of lawful presence, the amici States noted, "violates Congress's extensive statutory framework defining when aliens are authorized to be present in the country." *Id.* at 6. The States explained:

> The Executive has no power to unilaterally "create immigration classifications" that authorize aliens' presence in this country because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," *Texas*, 809 F.3d at 179. DACA violates the INA just like the materially identical DAPA program.

Id. at 7 (citation omitted).

The States further explained that DACA violated statutes governing which aliens are authorized to work in this country:

> [W]hen Congress wanted to provide work-authorization eligibility to four narrow classes of deferred-action recipients, it did so by statute. Otherwise, the 1986 IRCA "prohibit[s] the employment of aliens who are unauthorized to work in the United States because they either *entered the country illegally*, or are in an immigration status which does not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5655-56 (emphasis added).

Id. at 15-16 (footnote omitted). And the States surveyed various historical practices, explaining how they could not support DACA's unilateral conferral of lawful presence and work authorization. *Id.* at 18-20.

3. In sum, it is easily rational and not capricious to wind down a program based on a controversial assertion of unilateral Executive Branch authority, which Texas and other States had been challenging for years. No expansion of the administrative record or further discovery is needed to perform APA arbitrary-and-capricious review.

IV. Mandamus Is Proper to Stop Burdensome, Disorderly Litigation Across the Nation.

The Court should exercise its supervisory mandamus authority here to ensure that the judicial system operates in an orderly and efficient manner. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). Across the Nation, no less than nine lawsuits challenge DACA's rescission. *See supra* pp. 11-12. A decision here will provide nationwide direction, curtailing extraordinarily broad, resource-intensive discovery based on clearly incorrect legal theories that threaten to work irreparable harm to federal and state operations.

CONCLUSION

The Court should issue a writ of mandamus reversing the district court's orders relating to discovery and the administrative record or, in the alternative, grant a writ of certiorari to the Ninth Circuit and direct that court to issue a writ of mandamus reversing the district court orders.

Respectfully submitted.

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